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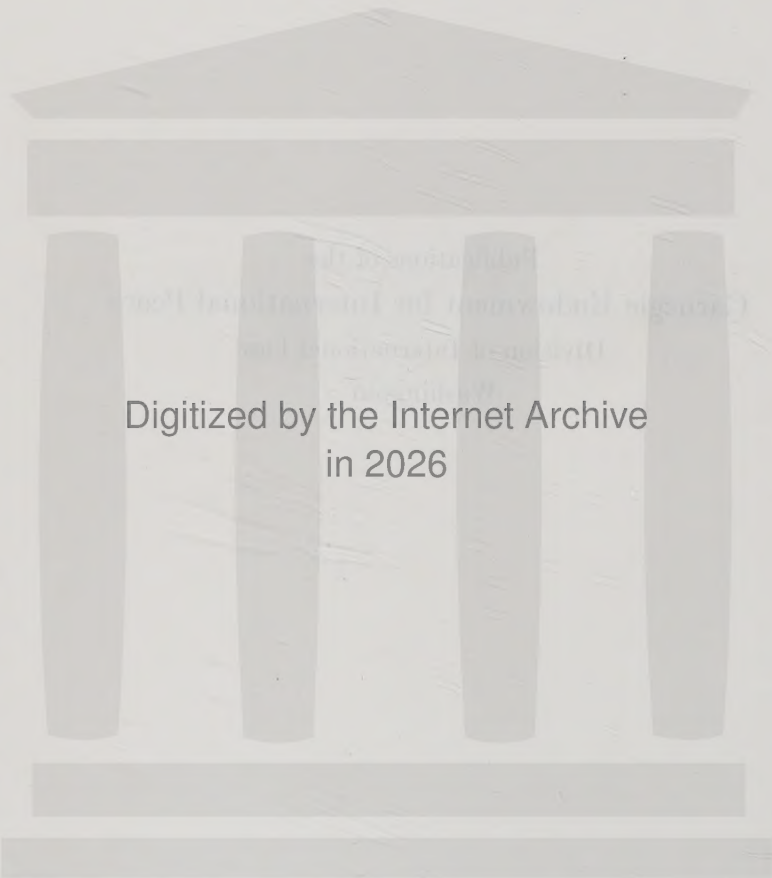
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INTERNATIONAL ADJUDICATIONS

ANCIENT and MODERN

HISTORY AND DOCUMENTS

EDITED BY

Medieval Reports, Advisory Opinions, and
the Development of International Law
International Claims

INTERNATIONAL ADJUDICATIONS

MODERN SERIES

VOLUME I

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TOGETHER WITH

Mediatorial Reports, Advisory Opinions, and
the Decisions of Domestic Commissions, on
International Claims

Edited by

JOHN BASSETT MOORE

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GENERAL INTRODUCTION

Briefly expressed, the primary purpose of the present work is to exhibit the judicial phase of international life. Stated more definitely, its object is to furnish an intelligible and fully documented report of all judicial decisions of international questions not recorded in the ordinary law reports; and, with this object specifically in mind, I have, as is indicated in the title, endeavored in each instance to combine with the documents a history of the case. As a knowledge of history, political, social and economic, in a broad sense, is admitted to be highly conducive to an intelligent interpretation and administration of the rules of municipal law, all the more must it be admitted to be essential to an intelligent understanding and application of the principles of international law, which still remains, and may long continue to be, largely customary. But, in a narrower sense, the historical approach is equally, if not even more, vital. Judicial judgments, in order to be intelligible and of constructive value, must be read in the light of the circumstances which gave rise to them. In many instances, the judgments of international tribunals have been deficient in the statement of the reasons on which they were founded, and have disclosed little or nothing of the antecedent facts. In such cases the meaning of the document, if only the text were read, might be practically lost, while, in reality, the decision may have been the culmination of a transaction of the first order. It is only in their historical and circumstantial setting that the individual significance and relative importance of judicial judgments can be correctly estimated.

The plan of the present work has from the beginning embraced the publication of mediatorial reports or recommendations on questions of international law. These acts, which are in the nature of advisory opinions, are included not because they are supposed to result from the exercise of judicial power, or to have the binding force of judicial decisions, but because, by reason of their tenor and the character and learning of the persons by whom they were made, they have brought an end to controversy, or contributed to its eventual solution, on legal grounds. I am less concerned with nice classifications and exclusive categories than I am with adding as much as possible to the materials with which the international structure may, especially on its legal side, be enlarged and strengthened and made more convenient and useful.

As the present work, in the form in which it is at length given to the public, represents the final consummation of a design formed more than forty years ago, and persistently carried on through all the vicissitudes and distractions of a varied and busy life, I may be excused for narrating briefly its origin and its evolution.

Soon after my first entrance into the Department of State, at Washington, in 1885, I became deeply interested in the examination of its unpublished records, and particularly, at the outset, in the collation and study of the records of the mixed commissions established from time to time, under treaties, conventions, or diplomatic agreements between the United States and other Powers, for the determination of international claims. This particular task was at first undertaken with a view to enlarge my contribution to the work known as Wharton's Digest of the International Law of the United States; but, when this work appeared, in three volumes, in 1886, not only had the digest of the rulings of the international commissions barely begun, but it had become apparent that it was a larger and more formidable task than the work of which it was originally expected to be contributory. The intention therefore of making it a part of another work was completely abandoned, and I was left to pursue it as a separate and independent project. In due time Congress provided for its publication, and in 1898 it appeared, in six volumes. The nature and scope of the work were indicated by the title, which described it as a "History and Digest of the International Arbitrations to which the United States has been a Party, together with Appendices Containing the Treaties relating to such Arbitrations, and Historical and Legal Notes on Other International Arbitrations Ancient and Modern, and on the Domestic Commissions of the United States for the Adjustment of International Claims."

In the preparation of the work thus described, I was more and more impressed with the importance of the judicial process in international relations, the extent of its actual application and the possibilities of its development, as well as with the general lack of knowledge of the subject. It was clear that this lack was chiefly due to the want of published sources from which the requisite information could be readily gained.

Among those who have acted on the belief that the greatest contribution they can make to legal science is laboriously to explore the records, unpublished as well as published, of human experience and to systematize and spread the knowledge of what those records contain, it is superfluous to remark upon the general propensity to use what lies within convenient reach. But, even apart from the propensity of

writers of text-books to rise on stepping-stones of prior treatises to higher things, there is not vouchsafed to every one the opportunity to do more than use the materials that are near at hand. Consequently, with the exception of Wheaton and certain other authorities, chiefly American and English, who had been in a position to become more or less acquainted with the treasures that lay hidden in the records of the general claims commissions between the United States and Great Britain, and between each of those powers and various other governments, writers were, especially before the appearance of my *History and Digest of International Arbitrations*, much in the habit of saying that little or nothing had been, or perhaps even could be, contributed to the exposition of international law and the development of international jurisprudence by the judgments of international tribunals. There seemed, therefore, to be an imperative occasion to continue the explorations I had already begun, and, discarding the limitations of time and nationality, to bring together all discoverable records of international judicial action, ancient and modern, into one comprehensive publication, in which there should be given, in appropriate historical setting, the full text of every international judicial decision, or opinion, and in addition certain affirmative matter lying, as the case might be, within the sphere or on the border of judicial action. For the purpose of carrying out this larger plan, the collection of materials, published as well as unpublished, was continued.

In May, 1911, Dr. Nicholas Murray Butler, President of Columbia University, in the course of a conversation requested me to put in writing any suggestions that occurred to me in regard to work which might be undertaken by the Carnegie Endowment for International Peace, which had then lately been established, and of which he was a Trustee. I accordingly drew up and communicated to him three memoranda, in the first of which, using the word "treaties" in its widest sense, I proposed the preparation and publication of a collection of all international treaties, ancient and modern; each treaty to be reproduced, and, as far as possible, verified in the original text or texts, and to be accompanied with an English version, where the original text was not English. In the second memorandum, I proposed a similar publication of all State Papers, both American and foreign, relating to foreign affairs, somewhat after the manner of Hertslet's *British and Foreign State Papers*, but on a broader basis. The third memorandum related to the work I had done and was still doing on a work which, as I described it, was designed "to constitute a permanent and continuing source of authority for all international proceedings of a judicial or even of a mediatorial nature." I particu-

larly mentioned the History and Digest of International Arbitrations which I had published in 1898, and while adverting to the fact that it was not protected by copyright, stated my purpose to use the materials it contained in the work which I had in contemplation. It was evident that the works outlined in the three memoranda would, if carried out, place at the disposal of tribunals, national as well as international, of administrative officials and of writers and students, the sources of international law in an amplitude and completeness never before essayed. Subsequently, the Trustees of the Endowment proposed to take over the publication of the work described in the third memorandum, and a contract to that end was duly executed. In the contract it was expressly specified that the work should embrace all international arbitrations, with historical and legal notes, and, so far as I might deem it to be germane, a history of mediations and of the proceedings of domestic commissions established for the adjustment of international claims, and it was further specified that the work should include all the matter contained in my History and Digest of International Arbitrations.

Demands for public service, but more especially the obstruction of international intercourse and correspondence from the breaking out of war in Europe in 1914 until a time subsequent to the termination of the military operations of the great conflict, seriously interfered with the further prosecution of the work; but it was continuously carried on as far as possible, and was prosecuted with renewed vigor after the removal of the obstacles just mentioned.

Eventually, in order to hasten the commencement of the publication of the work, I decided to divide it into two series, the ancient and the modern, the modern series to begin with the three arbitrations by means of mixed commissions under the treaty between Great Britain and the United States signed by Lord Grenville and John Jay, at London, on November 19, 1794, and commonly known in the United States as the Jay Treaty.

Fortunately, it happened that this division was historically correct. After the beginning of the religious dissensions and the resulting armed struggles that culminated in the Thirty Years' War, and through the great dynastic, territorial and commercial contests which characterized the seventeenth and eighteenth centuries, there was little opportunity for arbitration. The process fell into disuse, and remained in a state of suspended animation, until it was revived by the Jay Treaty. Of the three arbitrations for which this epoch-making instrument provided, two were eminently successful, while the third, although it was not carried to full fruition, opened the way to a

compromise and settlement directly between the two governments. In one of the two that were successful the foundations were laid of the settlement of the "Alabama" claims through the arbitral tribunal at Geneva in 1872.

The ancient series will begin with the earliest known arbitrations, and it is expected that the first volume will be devoted to the arbitrations among the Greeks. In both series the chronological order will, as nearly as possible, be followed, but it can hardly be adhered to so closely in the ancient as in the modern series. The investigation of the earlier records is necessarily slow and tedious, and researches are constantly revealing new sources. It is hoped that the disadvantages attending departures from the chronological order will eventually be overcome by a helpful system of indexing.

The question of a proper title for the whole work has been the subject of much reflection. Although the work chiefly consists of arbitral decisions, sometimes rendered by single arbitrators, but more often by a board sitting as a mixed commission, the word "arbitration" does not occur in the title which I have adopted. Its omission is due, not to any doubt that arbitration is a judicial process and that international arbitrators, if they faithfully discharge their duties, act as judges and not as international conciliators or as advocates of the parties. Arbitration has, in fact, been the name applied to the judicial process in international relations, and was employed for that purpose by writers on international law because *arbitrator* was the name given in municipal law to those who were specially appointed by the parties to decide a particular case, in order to distinguish them from the judges of the ordinary and permanent tribunals. An examination of the authorities, national as well as international, leaves no room for doubt that an arbitrator was considered as acting in a judicial capacity, and not as a conciliator or amicable compounder (*amiable compositeur*). International arbitrators have, it is true, in some cases been invested with conciliatory powers, and in some instances even with the power to supplement their work as arbitrators with regulations to be binding on the parties to the dispute; but this does not in any way tend to show that the function of the arbitrator is not essentially judicial. The ordinary magistrates, in countries having the Roman Civil Law as the basis of their jurisdiction, are often invested in an auxiliary way with conciliatory powers, and the case is to some extent the same even in countries which have the Common Law. Nor does the fact that an arbitrator is not a permanent official detract from his judicial character. No doubt, a body having a permanent personnel is more likely to exhibit consistency in

its decisions, whether they be strictly judicial or not, than a temporary tribunal established for the determination of a particular case or of a group of cases. But the question whether a particular judgment, decision, or award is judicial or non-judicial depends upon the quality of the act and the spirit in which it is performed, and not upon the length or brevity of the tenure of the person who performs it. As a learned writer has lately remarked, "the Roman law was evolved and perfected without a permanent judicial body." In the United States during the past seventy-five years there has been a tendency not only to make the judicial office elective but also to limit its tenure to a term of years. But it has not been supposed that this course was taken with a view to detract from the judicial character of the courts or even to impair the force of precedent as a means of developing the law. In reality, as an examination of the record will show, there has been a striking tendency among arbitrators to cite previous arbitral decisions as precedents, and such citations may be found even on the part of arbitrators in whose countries judicial decisions are not treated as legally binding authorities.

The reason of the precise phraseology of the title which has been adopted is to be found in the effort to embrace various processes or forms of process, all judicial in their nature, some of which do not strictly fall within the scope of the word *arbitration*. For centuries under the old Germanic Empire, among the Swiss Cantons, and among the City States of Northern Italy, to say nothing of other quarters, disputes between States and Princes were often pacifically determined by methods which might not be considered as wholly or technically arbitral; and this was done to a great extent under provisions of a general and permanent character. Moreover, in addition to the numerous cases in which bodies technically called joint commissions, composed of an equal number of representatives of each party, have been appointed to run a boundary line or to make a mutual adjustment of accounts by a process of give and take, such commissions have, as in the case of the Alaskan boundary in 1903, sometimes been appointed to determine specific questions by a decision on the merits, provided a specified number of votes representing more than a half of the members should be cast in favor of the claim of the one part or the other. It is obvious that joint commissions, even when thus conditionally empowered to decide, differ from mixed arbitral commissions composed of an uneven number of persons and empowered to decide by a majority in any event. Mention may also be made of the decision in 1927 of the Labrador boundary question, which was submitted by His Britannic Majesty, under an agreement

between the governments of Canada and Newfoundland, to the final determination of the Judicial Committee of the Privy Council. On the other hand, there has been an active and widespread agitation in recent years for the establishment of permanent international tribunals, and particularly of tribunals with a permanent personnel, not chosen by the parties for the occasion, and with a certain measure of compulsory jurisdiction. An example of such a tribunal may be found in the Central American Court of Justice prior to the time of its unfortunate dissolution. A more recent and more important example is that of the Permanent Court of International Justice at The Hague. Under the Statute of this Court, some of the judges may, under certain circumstances, be directly appointed by the parties to the litigation for the particular occasion, just as in the ordinary case of a tribunal of arbitration; but, even when this takes place, a tribunal a majority of whose members are permanent judges, not directly appointed by the parties to the suit, does not present itself to the mind as an arbitral court of the usual kind. In the course of time the number of such tribunals may increase. It is also conceivable that the experiment may yet be tried of an international tribunal in which none of the judges on the bench will be directly appointed by parties to sit in the particular case, and in which the judgment of the court therefore cannot be determined by the vote of such a judge. For these reasons, as well as for the purpose of avoiding controversial terms, I have used as my general title *International Adjudications*, while mentioning specifically certain other included classes of legal matter.

In order to avoid inordinately expanding this general introduction, I have added to it, under a separate heading, historical and legal notes explanatory of the subject matter of the collection.

JOHN BASSETT MOORE.

February 26, 1929.

NOTES ON THE HISTORICAL AND LEGAL PHASES OF THE ADJUDICATION OF INTER- NATIONAL DISPUTES¹

In public discussions of the judicial method of settling international disputes, whether by means of judges designated as arbitrators, or by means of judges assigned to another technical category or at any rate called by another name, one often finds examples of the familiar truth that verbal distinctions, even if they are only titular, may give rise to substantial misconceptions, misleading in their implications and injurious in their effects. Against this tendency the appropriate safeguard is correct information and an understanding of elementary principles. For this reason I have brought together in this paper, with little argument or commentary of my own, the statements of fact and the considered opinions of the highest authorities on the essential questions involved in the subject under consideration. These expressions, cogent and singularly unanimous, leave little room for error or even for debate.

I. The Word "Adjudication"

The English word "adjudication," derived from the Latin *adjudicatio*, in its general sense merely signifies a judicial decision, or the act or process of adjudicating or adjudging: to adjudge means to give a judicial decision concerning; to adjudicate upon or decide judicially; to award or bestow by formal decision. (Standard Dictionary.)

That this definition has the support of the authorities, appears by the following examples:

Adjudication.—1. The act of adjudicating; the act or process of determining or adjudging; a passing of sentence. 2. In *law*; (a) A judicial sentence; judgment or decision of a court. (b) The act of a court declaring an ascertained fact: as, an *adjudication* of bankruptcy. (Century Dictionary.) 1. The act of adjudicating or adjudging; an awarding or settling by judicial decree. 2. A judicial sentence, or award. (Oxford Dictionary.) 1. Act or process of adjudicating. 2. A solemn or deliberate determination by the judicial power; a judicial decision or sentence. (Webster, New International.)

¹ By permission of The Macmillan Company, from a work by the author entitled *International Law and the Adjudication of International Disputes*.

Adjudicate.—To adjudge; pronounce judgment upon; award judicially. (Century.) To try and determine judicially; to pronounce by sentence of court. (Oxford.) To hear or try and determine, as a court; to settle by judicial decree; to adjudge. (Webster, New International.)

Adjudge.—1. To award judicially; assign; . . . 2. To decide by a judicial opinion or sentence; to adjudicate upon; determine; settle. (Century.) 1. To settle, determine, or decide, judicially; to adjudicate upon. 2. To pronounce or decree by judicial sentence (a thing to be, or that it is so and so). 5. To sentence or condemn (any one to a penalty, or to do or suffer something). 6. To award judicially; to grant, bestow, or impose by judicial sentence (a thing to or unto a person). (Oxford.) To determine in the exercise of judicial power; to decide or determine judicially; to adjudicate, order, or decree. (Webster, New International.)¹

II. The Essence of Judicial Action

1. THE WORD "JUDICIAL"

The English word "judicial" in its general sense, technical as well as popular, applies to that which belongs to the administration of justice, comprehending the tribunals and their members, the processes employed by them, the investigation of the facts and the law, the hearing of the parties directly or through their representatives, and the making of decisions, both interlocutory and final.

Thus, in the Oxford Dictionary, the word is defined in the following senses:

1. Of or belonging to judgement in a court of law, or to a judge in relation to this function; pertaining to the administration of justice; proper to a court of law or a legal tribunal; resulting from or fixed by a judgement in court. . . . 2. Having the function of judgement; invested with authority to judge causes. . . . 3. Of a judge; proper to a judge. . . . 4. Giving judgement or decision upon any matter; forming or expressing a judgement; disposed to pass judgement; relative to judgement; critical.

In the Century Dictionary (1913), we find:

1. Of or pertaining to a judge; proper to the character of a judge; judge-like. . . . 2. Pertaining to the administration of justice; proper to a court of law; consisting of or resulting from legal inquiry

¹The Latin verb *adjudico*, the common origin of the English "adjudicate," "adjudge," means: "1. To adjudge or award a thing to one, as a judge. . . . a. *adjudicare causam alicui*, to decide in one's favor, Cic. de Or. 2, 29, 129.—b. *Adjudicare*, to make a decision, to decide." Andrews, Latin-English Lexicon, 1875.

or judgment; as, *judicial* power or proceedings; a *judicial* decision. . . . 5. Having the nature of a judgment or punishment.

Webster, New International Dictionary (1928), comprehensively says:

1. Of or pertaining or appropriate to the administration of justice, or courts of justice, or a judge thereof, or the proceedings therein.

The Standard Dictionary (1927) specifies, among its interpretations:

1. Of or pertaining to the administration of justice; as, *judicial* decisions. 2. Of or pertaining to a court or judge; as, the *judicial* office. 3. Hence, such as befits a judge, discriminating; thorough, impartial; as, a *judicial* mind. . . .¹

"Judicial Power" has been defined as "the power to construe and expound the law as distinguished from the legislative and executive functions."²

In England, among the tribunals classed as judicial, one of the highest and most important is the Judicial Committee of the Privy Council, established by 2 and 3 Wm. 4, c. 92, for the disposal of appeals to the Sovereign in Council. It consists of the Lord Chancellor, the Lord President, ex-Lords President, the six Lords of Appeal in Ordinary, and such other members of the Privy Council as shall from time to time hold or have held "High Judicial Office." In form it reports to the King advising that an appeal should be allowed or disallowed; but the proceedings before it are conducted as before a judicial court, and its report is called a judgment, although it does not operate as a final decree until it has been formally approved and embodied in an order in council. Among the appeals with which the Judicial Committee deals are those from colonial courts, from ecclesiastical courts, and from courts of admiralty sitting in prize cases.³

In French we have the words *judiciaire* and *juridique* used in senses similar to those of the word "judicial."⁴

¹ Cochran defines "judicial" as "relating to proceedings before a judge or in a court." The Student's Law Lexicon, revised ed. Cincinnati, 1909.

Ballantine, "pertaining to or partaking of the office or functions of a judge or other officer or body having power to decide as judge or court." Law Dictionary, San Francisco, 1916.

² Bouvier, Law Dictionary, 8th ed. 1914.

³ Wharton, Law Lexicon 13th ed. 1925; Halsbury, Laws of England, vol. 9, tit. Courts, part IV, §§ 46 et seq.

⁴ "*Judiciaire*, adj. (—du Lat. *judicium*, jugement). Qui a rapport à l'administration de la justice." "*Juridique*, adj. (Lat. *juridicus*; de *jus*, droit. . . .) Qui se fait en justice; qui est dans les formes, dans les usages de la justice: sentence, arrêt *juridique*. Intenter une action *juridique*." Larousse, Grand dictionnaire universel.

2. JUDICIAL TITLES

In municipal law the title most frequently given to those who exercise judicial power is that of judge, and, by reason of its prevalent association with the power of hearing and deciding, it is often indiscriminately applied to judicial officers who have another title, more distinctly indicating the specific character of their judicial duties and of the tribunal in which they sit.

Hence, Webster's New International Dictionary (1928), in defining the word "judge," as a noun, well says:

A public officer who is invested with authority to determine litigated questions; one who gives a judgment; especially, the presiding magistrate in a court of justice. In its ordinary modern legal use the word *judge* means a presiding magistrate of a court of justice named as a "*judge*" in his commission; but, in wider senses, it is used to designate any person who performs one or more of the functions above mentioned, including a justice of the peace, a referee, or even a jurymen, as the context indicates. In both the United States and Great Britain the term *judge* has become a general and often loose title applied informally to judicial officers of most descriptions. Thus where the members of a court are officially known as "Justices," one is often individually referred to as "Judge so-and-so" or "the Judge." So "Recorders," "Surrogates," "Chancellors," etc., are frequently called "Judge."

In the Century Dictionary (1913), we read:

Judge (n) . . . 1. A public officer invested with authority to hear and determine causes, civil or criminal, and to administer justice between parties in courts held for the purpose; a public officer appointed to exercise the judicial power; a justice; a magistrate. . . . 4. . . . an authorized arbiter. . . .

In the Oxford Dictionary we find:

Judge (n) 1. A public officer appointed to administer the law; one who has authority to hear and try causes in a court of justice.

"*Judiciaire*, adj. 1. Qui est relatif à l'administration de la justice. . . . 2. Qui se fait en justice, par l'autorité de justice." "*Juridique*, adj. Qui se fait en justice." (Littré.) As examples of the use of the word *judiciaire*, Littré gives: "Les formes judiciaires. Enquête judiciaire. Acte judiciaire. Témoin judiciaire. Combat judiciaire."

Fleming and Tibbins, in their French-English Dictionary, 1857, include in their definitions of *judiciaire*: "Judicial," "judiciary," "legal"; and in those of *juridique*: "Legal," "juridical," "lawful." With the addition of the word "forensic," the same English equivalents are given in the French-English dictionary of Cassell, and of Spiers, 1911. See, also, Clifton and Grimaux, 1923, *udiciaire*.

Soufflier, in his *Vocabulaire de droit*, Paris, 1908, defines *Judiciaire*: "Ce qui est relatif à la justice, à son administration; qui se fait en justice, par autorité de justice."

As a generic or descriptive term, *judge* is applicable to any person occupying such an official position, but by usage, it has, in the United Kingdom, become much restricted as a particular designation . . .

4. A person appointed to decide in any contest, competition, or dispute, an arbiter, umpire.

The Standard Dictionary (1927), defines the word as meaning "a judicial officer invested with authority to administer justice"; and, while stating that "a *judge*, in the legal sense, is a judicial officer appointed or elected to preside in courts of law, and to decide legal questions duly brought before him," says that the name is sometimes given to other legally constituted officers, such as justices of the peace, referees, and even to jurymen, and explains the distinctive functions in municipal law of referees, arbitrators or arbiters, and umpires.

In French the equivalent of the English noun "judge" is *juge*, which Littré defines, in its first and general sense, as he who judges, who has the right and the authority to judge; and specifically as a man appointed by public authority to render justice to individuals.¹ Speaking in a yet narrower and more special sense, he classifies as *juges de rigueur* judges who must pronounce according to the rigor of the law, as distinguished from arbiters, who may decide according to natural equity; and says that the same term is applied to inferior judges, as distinguished from judges who pronounce in last resort, and who sometimes take the liberty of softening the rigor of the law.²

3. THE ACT OF JUDGING

The act of judging implies the exercise of the power to hear and determine. Thus, the Oxford Dictionary, in defining the verb to "judge," says:

I Transitive sense.

1. To try, or pronounce sentence upon (a person) in a court of justice; to sit in judgement upon. 2. *spec.* To pronounce sen-

¹ 1. Celui qui juge, qui a le droit et l'autorité de juger. 2. Homme préposé par autorité publique pour rendre la justice aux particuliers.

² 4. Juges de rigueur, les juges qui doivent prononcer suivant la rigueur de la loi; à la différence des arbitres, qui peuvent se décider d'après l'équité naturelle. Juges de rigueur, s'est dit aussi des juges subalternes; à la différence des juges qui prononçaient en dernier ressort, et qui se permettaient quelquefois d'adoucir la rigueur de la loi.

The following examples of definitions of *juge* may be added: Fleming and Tibbins, 1857 [celui qui a l'autorité de juger; magistrat; . . . arbitre], *judge*.—Cassell, 1903, *judge*, justice.—Spiers, 1911, *judge*, justice.—Clifton and Grimaux, 1923, *judge* . . . magistrate, justice . . . arbiter.

tence against (a person); to sentence, condemn. 3. To give sentence concerning (a matter); to try (a cause); to determine, decide (a question). 4. To decide by judicial authority that something is to be done, or is the fact; to decree, order.

II Intransitive sense.

14. To act as judge; to try causes and pronounce sentences in a court of justice; to sit in judgement. 15. To give a decision or opinion on any matter, esp. between contending parties; to arbitrate.

The Century Dictionary (1913), gives the following definitions:

. . . I. *intrans.* 1. to act as a judge; pronounce upon the merits of a cause or controversy; pass judgment.

II. *trans.* 1. To hear and determine authoritatively, as a cause or controversy. . . .

In Webster's New International (1928), we find:

3. To hear and determine (a matter) judicially; to decide by judgment; to try; also, to decree or adjudge to be or to be done. 5. To determine or pronounce upon inquiry or deliberation; to conclude or decide by the exercise of the judgment. . . .

The Standard Dictionary, among its definitions, includes: "2. To decide authoritatively, as a controversy or suit, by weighing evidence and deciding questions of law or discretion; as, to *judge* a case."¹

4. FINAL DECISION—JUDGMENT, AWARD, SENTENCE

(1) *Judgment*. In legal parlance the final decision of an ordinary court of law is usually called a judgment, and this term is sometimes applied to "any formal or authoritative decision, as of an umpire or arbiter."²

The Century Dictionary (1913), under "Judgment," says:

4. The decision of a judge or of one acting as a judge; an authoritative determination; specifically, the judicial decision of a cause in court; adjudication; award; sentence.

¹ Of the definitions of the equivalent French verb *juger*, the following examples may be given: Littré, to pronounce, in the character of judge, on a case or on a person (*prononcer, en qualité de juge, sur une affaire ou sur une personne*); to decide as arbitrator on some dispute (*décider, comme arbitre en quelque différend*).—Fleming and Tibbins, 1857, to judge, to try.—Cassell, 1903, to judge, to pass sentence, to give judgment.—Spiers, 1911, 1. To judge; . . . 5. (law) to adjudicate; 6. (law) to try.—Clifton & Grimaux, 1923, to judge, to pass sentence on, to try.

² Oxford Dictionary, *Judgement*, 5.

Specifically—(a) the determination of the rights of the parties in a common-law action, as distinguished from a decree in chancery; (b) the determination of the rights of the parties in any action, legal, or equitable, under the reformed procedure; (c) the document embodying such determination. . . .

The following definitions may also be quoted:

The pronouncing of an opinion or decision of a formal or authoritative nature; . . .

2. *Law*, a. The act of determining, as in courts, what is conformable to law and justice. (Webster, New International, 1928.)

3. *Law*. (1) The sentence or final order of a court in a civil or criminal proceeding; the sentence of the law; the final determination or adjudication of the rights of the parties to an action; decision, award. (Standard Dictionary, 1927.)

In law, a term used to describe (1) the adjudication by a court of justice upon a controversy submitted to it *inter partes* (*post litem contestatam*) and determining the rights of the parties and the relief to be awarded by the court as between them; (2) the formal document issuing from the court in which that adjudication is expressed; (3) the opinions of the judges expressed in a review of the facts and law applicable to the controversy leading up to the adjudication expressed in the formal document. (Encyclopædia Britannica.)

The decision of a court; the expression by a judge of the reasons for his decision. (Cochran, The Student's Law Lexicon, 1909.)

The final consideration and determination of a court of competent jurisdiction upon the matters submitted to it. (Ballantine, Law Dictionary, 1916.)¹

(2) *Award*. This word, as a noun, is, according to the Oxford Dictionary, used in the following senses:

1. A decision after examination, a judicial sentence, *esp.* that of an arbitrator or umpire; the document embodying it. 2. That which is awarded or assigned, as payment, penalty, etc., by the terms of the judge's sentence or arbitrator's decision.

The following definitions may also be quoted:

1. A decision after examination and deliberation; a judicial sentence; especially, the decision of arbitrators on points submitted to them or the document containing such a decision. . . . (Century, 1913.)

¹ The equivalent word in French, *jugement*, Littré defines, in the sense of jurisprudence, as the act of judging, the decision pronounced in justice, the judgment in a suit (*Terme de jurisprudence. Action de juger; décision prononcée en justice. Jugement d'un procès*).—Fleming & Tibbins, 1857, in jurisprudence, trial, judgment, judging; in civil matters, judgment, decree, award; the decision rendered by a jury, verdict.—Cassell, judgment, trial, sentence.—Spiers, 1911, judgment, trial, sentence.—Clifton & Grimaux, 1923, judgment, act of judging, trial, sentence.

1. A judgment, sentence, or final decision; specif., the decision of arbitrators in a case submitted. (Webster, New International, 1928.)

1. A decision rendered by a judge or umpire, especially, in law, a decision by arbitrators on a matter in controversy duly submitted to them. . . . 2. The paper, writing or instrument containing the decision of arbitrators and signed by them. 3. The thing or the amount awarded by the decision of arbitrators, jurors, or judges. (Standard, 1927.)

(3) *Sentence*. This word, as a noun, comprehends, according to the Oxford Dictionary, among its meanings:

2. The opinion pronounced by a person on some particular question, usually, one on which he is consulted or which is being deliberated upon. 3. An authoritative decision; a judgement pronounced by a tribunal. . . .

Similar definitions are included in the Century Dictionary (1913), the Standard (1927), and Webster's New International (1928).

In all these authorities notice is taken of the fact that the word "sentence" is technically applied to the final decisions or judgments of courts of prize and of ecclesiastical courts, as well as the penalty pronounced on a person convicted of crime, just as the word *decree* is applied to the judgments of courts of equity and of admiralty. It may be superfluous to add that these differences in terminology do not in any way affect the judicial character of the particular decision, or of the tribunal by which it is given.

It is a fact well known to persons familiar with the subject that the judgment or award of international arbitrators is often spoken of as a sentence.¹

5. JUSTICE

The object of judicial proceedings is the administering of justice, through the application of law or equity.² Equity, in the technical sense in which the word is used in Great Britain and the British Dominions, and in the United States, denotes the peculiar system of law which was developed in the English Court of Chancery. Introduced for the purpose of supplying defects in the common law and in common law processes, the emphasis in equity "was laid on the morality or conscientiousness of conduct, and hence on obligations growing out

¹ The equivalent word in French, *sentence*, is defined by Littré as a judgment rendered by judges or by arbitrators (*jugement rendu par des juges, par des arbitres*).

² In the Oxford Dictionary, under *Justice*, the second general head of the definitions is: "Judicial administration of law or equity." Webster, New International, 1928, speaks of "the establishment or determination of rights according to the rules of law or equity."

of such conduct, thus giving rise to the law of trusts."¹ But, in its general sense, "equity means fairness, and is sometimes used to denote the exercise of discretion, which within certain limits may be allowed to a judge in the application of rules of law so as to prevent their harsh operation."²

A legal lexicographer of long established authority, citing the celebrated words of Justinian, defines justice as "the constant and perpetual disposition to render to every man his due";³ and, again, as "the conformity of our actions and our will to the law."⁴

"Justice . . . as ascertained by natural reason or ethical insight" is not a technical term, "except in so far as courts which administer equity seek to discover it" by those agencies "or apply it beyond the strict lines of positive law."⁵

The English word "law" includes both the Latin words *jus* and *lex*, and the French words *droit* and *loi*, and thus comprehends both unwritten and written rules, and customary as well as statutory law. Thus, declarations of legal principles or interpretations of express laws by courts of justice, although they cannot be called "laws," may be said to form part of the law which is enforced by courts of justice; justice meaning, in this connection, not only the doing of right, or the duty to do right, as between man and man, "but the purpose and endeavor of the State to cause right to be done."⁶

Law being once established, the word, in legal matters, "denotes what is done in express fulfilment of the rules of law, or is approved and allowed by law. . . . The words 'just' and 'justice', and corresponding words in other tongues, have never quite lost ethical sig-

¹ Stone, *Law and its Administration*, 92, 96-7. The fact that in England "equity principles were developed in a separate court, whose freedom of action was unembarrassed by legal rules, undoubtedly facilitated the expansion of equity and thus made it a more effective agency in grafting on our [Anglo-American] legal system the notion that even legal rights might be subjected to equitable limitations based on moral principles." But, in most of the States of the United States, "the equity system has now become completely incorporated into the legal system," with the result that the principles of the common law have been combined with and to some extent modified by the principles of equity. *Id.* 104.

² *Id.* 92.

³ Bouvier, *Law Dict.*, 8th ed. 1914, citing *Inst. b. 1, tit. 1*; Coke, 2d *Inst.* 56. The same words are in *Black, Law Dict.*, 2d ed. 1910.

⁴ Bouvier, citing Touillier, *Droit civ. fr. tit. prélim. n. 5*. Wharton, in his *Law Lexicon*, 1925, defines justice as "the virtue by which we give to every man what is his due, opposed to injury or wrong."

⁵ *Black, Law Dict.*, 2d ed. 1910, under *Equity*. The definitions of the French word *justice*, in Littré, are in harmony with those quoted here from Bouvier and Black of the English word justice. Littré speaks of the power to do right to each one, to recompense and to punish, and the exercise of this power (*le pouvoir de faire droit à chacun, de récompenser et de punir; l'exercice de ce pouvoir*), and of judicial power (*le pouvoir judiciaire*).

⁶ Pollock, *A First Book of Jurisprudence*, 4th ed. 1918, 8, 15, 16.

nificance even in the most technical legal context. The reason of this (unduly neglected by some moderns for the sake of a merely verbal and illusive exactness) is that in the development of the law both by legislative and by judicial processes appeal is constantly made to ethical reason and the moral judgment of the community. . . . Legal justice aims at realizing moral justice within its range, and its strength largely consists in the general feeling that it is so. Were the legal formulation of right permanently estranged from the moral judgment of good citizens, the State would be divided against itself."¹

III. Arbitration

1. IN MUNICIPAL LAW

(1) CONTINENTAL EUROPEAN LAW

Naturally, no attempt will be made here to cover the entire body of continental law, but some typical examples will be given showing the general conception of arbitration, as derived in the main from the Roman Law.²

Arbitration (*arbitrage*), signifying the jurisdiction conferred on private individuals, called arbitrators, by the will of the parties or by the law, to judge (*jurer*) differences which it is not forbidden to settle by agreement, has existed in France from early times, and has been the subject of numerous legislative acts. The arbitrators are invested with jurisdiction by an agreement between the parties, called a *compromis*,³ which defines the subject in dispute, and contains, besides the names of the arbitrators, the conditions to which the parties declare their submission. The judgment must be signed, and, in substance and in form, must conform to the rules of law (*règles de droit*), unless the parties have by the *compromis* authorized the arbitrators to

¹ Pollock, *A First Book of Jurisprudence*, 4th ed. 1918, 32-33.

² "Arbitration is framed on the model of judicial trials, and its object is to put an end to litigation." Justinian's Digest, 4, 8, 1, Monro's translation, Cambridge, 1904. "A man is held to have undertaken an arbitration, so Pedius says (b. 9), when he has assumed the duties of judge and promises to give a decision which shall finally dispose of the matters in dispute." Dig., 4, 8, 13, Monro's translation.

³ Latin, *compromissum*, signifying a mutual promise or engagement to abide by the award of an arbiter. See Andrews' *Latin-English Lexicon*, 1875; Harper's *New Latin Dictionary*, 1907; Smith's *Latin-English Dictionary*, 1912. These lexicographers define *arbiter*, in legal terminology, as an "umpire, arbiter, a judge," and say that the *arbiter* decided according to equity, while the *judex* decided according to strict law; but Andrews and Harper go on to state that, in the time of Cicero, when, according to the *Lex Aebutia*, the decisions were given in definite formulae of the praetor, the "formal distinction" between the *judex* and the *arbiter* disappeared: citing Cic. Mur. 12 fin. The judgment or decision of an arbitrator was called *arbitrium*.

decide as friendly mediators (*amiables compositeurs*). If the arbitrators have been thus freed from the observance of legal rules in deciding on the merits, they are also relieved from adherence to the procedure of the common law in the case before them. When there is an equal division, the arbitrators appoint a third arbitrator or umpire (*sur-arbitre*), who must judge the dispute, after having conferred with the arbitrators. Arbitral judgments may be executed only after their deposit with the clerk of the civil court of the district in which the decision was given, and the issue by the president of the court of an order of *exequatur*. They then have, as regards their effects, the same force as if they emanated from the ordinary courts. They are also subject to the same rights of registry.¹

As between the parties, the decision of the arbitrators has the character of *res judicata* (*chose jugée*), and has, in a general way, the probative force of a judgment.²

From the fact that the parties have by the *compromis* relieved the arbitrators from the observance of legal forms, it does not follow that they have given them the power to disregard the rules of law and to decide as *amiables compositeurs*; nor does the fact that the parties renounced the right to appeal from or to sue for a reversal of the arbitral award (*sentence*) modify in any way the nature of the arbitration, arbitrators having always preserved the character of judges called in to render a decision (*le caractère de juges appelés à statuer*) in place of a court.³

As arbitrators form a legal tribunal and are, as regards the parties who have appointed them, real judges (*véritables juges*), invested for the purpose of their special mission with all the powers ascribed to the latter, they have, like ordinary judges (*juges ordinaires*), the right to verify the avowals and acknowledgments made before them in the course of the proceeding, and to determine their bearing on the decision of the case submitted to them.⁴ For the same reason they must be impartial and independent, and forget which party appointed them.⁵ From the same source—their judicial character—is inferred the power to determine the extent of their jurisdiction under the

¹ Larousse, Grand dictionnaire universel, *Arbitrage*; La grande encyclopédie, *Arbitrage*.

² La grande encyclopédie, *Arbitre*. See, also, Carpentier, G. F. du Saint, Répertoire général alphabétique du droit français, Paris, 1888, IV. 684 et seq.

³ Courty c. Darvoy (1844), Cour roy. d'Orléans, Sirey, 1845, 2. 80.

⁴ Vincent etc. c. Debaume (1834), Dalloz, Rép. IV. 510.

⁵ Marleix c. Sollier et Vallim (1838), Dalloz, Rép. IV. 390. For the reason above stated, it was held in this case that an award was not open to attack on the ground that two arbitrators who were appointed respectively by two partners should, because of the identity of interest of the partners, have had only one vote.

arbitral agreement, although the agreement does not in terms authorize them to do so.¹

Arbitration and the conditions under which it must be carried on are regulated in France by articles 1003-1028 of the Code of Civil Procedure.² These articles determine personal capacity to resort to arbitration, the nature and formalities of the arbitral agreement, the procedure to be followed in the trial and the rendering of the award, and the right and mode of appeal. Article 1019 expressly provides that the arbitrators and the umpire shall decide according to law, unless the agreement has empowered them to act in the capacity of a friendly compounder (*amiable compositeur*). As arbitration can be applied only to rights of which the parties have the free disposal, minors and other persons under legal disability cannot resort to it.

It is necessary to avoid confounding arbitrators who are real judges (*arbitres juges*) with arbitral reporters or advisers (*arbitres-rapporteurs ou donneurs d'avis*), who are appointed in certain matters by the courts of commerce (*tribunaux de commerce*) to hear the parties and if possible reconcile them, and, if they fail in this, to make known their opinion on the case, after examination of the books of account and other documents produced.³ Dalloz observes that it is sometimes difficult to determine when one has to deal with arbitrators in the true sense of the word, or only with experts; but that, if the persons designated to act have the task of pronouncing a decision binding on the parties they are arbitrators, while, if they are only to give an opinion, as is the case with *arbitres-rapporteurs*, they are merely experts.⁴

From the fact that an arbitral award is in reality a judgment, it logically and reasonably follows that, when it emanates from foreign arbitrators, it is subject, as regards its execution in France, to the rules applicable to foreign judgments, and that the *exequatur* (official recognition) can be granted only by the court and not by a simple order of the presiding judge.⁵

The law in Germany on the subject of arbitration is substantially the same as in France.⁶ Although the arbitrator holds a contractual

¹ Devilleneuve-Gilbert, *Jurisprudence du xix^e siècle*, I, 462.

² Nouveau Larousse, *Arbitrage*. For the law of Dec. 27, 1897, relating to voluntary conciliation and arbitration in the matter of collective disputes between employers and workers or employés, see Journ. Off. Dec. 28, 1892.

³ Nouveau Larousse, *Arbitrage*.

⁴ Dalloz, *Dictionnaire pratique de droit*, I, 84, *Arbitrage*. The same distinction is observed in Belgian law, (*Jouret et consorts c. Botte-Boule* (1888), D. P. 1890, 2, 12). Dalloz criticizes Article 429 of the French Code of Civil Procedure as having confounded the distinction between arbitrators and experts and their respective functions.

⁵ Marquis de Santa-Cristina c. Prince et Princesse del Drago (1901), D. P. 1905, 2, 178.

⁶ "In private law, the arbitrator is a person appointed by individuals to decide

relation to the parties, and is responsible to them for the fulfilment of his mission, to the orderly performance of which both may hold him, yet it is his function to decide, like a judge of the state, a lawsuit, and to administer justice by applying the principles of law to the facts of the case;¹ and the result of the performance of his duties is a judgment, which is binding on the parties.² Like the state judge, he enjoys independence in the discharge of his functions, and in some respects he has greater freedom than the ordinary judge.³ The arbitral award may be contested on grounds similar to those on which the decisions of the courts may be attacked.⁴ Unless the arbitral agreement otherwise provides, the decision may, in the case of several arbitrators, be made by an absolute majority of votes.⁵ While the legal validity of foreign arbitral awards is not directly regulated by the code, the question of their enforcement in Germany is to be adjudicated in accordance with the principles of private international law.⁶

The usual distinction is made between arbitrators and mere expert appraisers or advisers.⁷

Arbitral procedure is generally the subject of statutory regulation.⁸

(2) ENGLISH LAW

In treating of the redress of private wrongs by the act of the parties, Blackstone, after discussing the several species of remedies by the act of the parties injured, deals with the remedies that arise from the

a lawsuit by his judgment or award." Brockhaus's *Konversations-Lexikon*, 14th ed. 1903. In Germany, as in France, the practice of arbitration is regulated by the Code of Civil Procedure. See articles 1025–1041, *Zivilprozessordnung und Gerichtsverfassungsgesetz*, Vol. 11, in *Guttentag'sche Sammlung Deutscher Reichsgesetze*, Berlin, 1910.

¹ Urt. v. 3. Dezember 1918, *Entscheidungen des Reichsgerichts in Zivilsachen*, Vol. 94, 211, 212. (Leipzig, 1919.)

² Art. 1040, *Zivilprozessordnung und Gerichtsverfassungsgesetz*, Vol. 11, in *Guttentag'sche Sammlung Deutscher Reichsgesetze*, Berlin, 1910.—Urt. v. 29. November 1904. *Entscheidungen des Reichsgerichts in Zivilsachen*, Vol. 59, 247, 249. (Leipzig, 1905.)

³ Urt. v. 21. März 1898, *Entscheidungen des Reichsgerichts in Zivilsachen*, Vol. 41, 251, 255. (Leipzig, 1898.)

⁴ Id. 256.

⁵ Art. 1038, *Zivilprozessordnung und Gerichtsverfassungsgesetz*, Vol. 11, in *Guttentag'sche Sammlung Deutscher Reichsgesetze*, Berlin, 1910.

⁶ Urt. v. 25. Januar 1881, *Entscheidungen des Reichsgerichts in Zivilsachen*, Vol. 5, 397, 399. (Leipzig, 1882.) Urt. v. 10. Dezember 1892, *Entscheidungen des Reichsgerichts in Zivilsachen*, Vol. 30, 368, 370–1. (Leipzig, 1893.)

⁷ Urt. v. 18. Juni 1915, *Entscheidungen des Reichsgerichts in Zivilsachen*, Vol. 87, 191, 193. (Leipzig, 1916.)

⁸ See, for Austria, *Zivilprozessordnung*, pt. VI., sec. 4, *Schiedsrichterliches Verfahren*, §§577–99, no. 217 in *Handausgabe Österreichischer Gesetze und Verordnungen*, Wien, 1924; for Italy, *Codice di procedura civile*, §§1–33, in *Franchi, L., Cinque codici*, Milano, 1922.

the other, their award was set aside for misconduct, it being held that they had "judicial functions to perform," and that, although intending no injustice, "they must observe the fundamental rules which govern judicial proceedings."¹

The appointment of an umpire by disagreeing arbitrators, since it involves "the absolute power of constituting the judge" who is to decide between them, "is a judicial act of the last importance."²

If a man is, on account of his skill in such matters, appointed to make a valuation, in such a manner that in making it "he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge, and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge."³ But, if the parties, by the terms of their agreement, intended that the person to whose decision the matter was submitted "should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration," it being the intention in such cases "that there shall be a judicial inquiry worked out in a judicial manner."⁴

(3) AMERICAN LAW

Bouvier defines arbitration as "the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called arbitrators or referees."⁵

An arbitration "at common law was but a judicial investigation out of court."⁶

Arbitrators are "judges chosen by the parties to decide the matter submitted to them, finally and without appeal."⁷

By the arbitrator's decision, which is called an award, "the question is as fully determined and the right transferred or settled as it could

¹ In re Arbitration between Gregon & Armstrong (1894), 70 L. T. 106, 107.

² Re Robert Lord v. Edmund Tanner Lord (1855), 26 L. J. Q. B. 34, 36.

³ In re Dawdry (1885), 15 Q. B. D. 426, 429.

⁴ In re Carus-McLean & Greene (1886), 18 Q. B. D. 7, 9, Lord Esher, M. R. See, also, In re Hopper (1867), 2 Q. B. D. 367, 373.

⁵ Law Dictionary, *Arbitration*. The same definition is given in Black's Law Dictionary, 1910. The distinction between an "arbiter," as "one who is bound to decide, not according to his own discretion, but according to the rules of law and equity," and an arbitrator, as one who may "decide according to his own sound judgment," is not observed in the law in the United States. Stimson, Concise Law Dictionary, Boston, 1911; *Arbiter*.

⁶ People v. Board of Supervisors (1891), 15 N. Y. Supp. 748. "The duties of an arbitrator are judicial." Perry v. Cobb, 88 Me. 435, 443.

⁷ Burchell v. Marsh (1854), 17 Howard (58 U. S.), 344, 349. See, to the same effect, Vaughn v. Graham (1884), 11 Mo. 575, 577; White Star, etc. v. Hultberg (1906), 220 Ill. 578, 602.

have been by the agreement of the parties or the judgment of a court of justice."¹

The same distinction is made in American as in English law between mere valuers or appraisers, who act on their own knowledge and informally, and arbitrators, who conduct an investigation "in the nature of a judicial inquiry" and who must, unless they would have their award held void, strictly observe rules of procedure prescribed by statute or by the agreement of submission.² "Like jurors impanelled for the trial of a cause, or judges on the bench," arbitrators "are invested, *pro hac vice*, with judicial functions, the rightful discharge of which calls for and presupposes the most absolute impartiality," just as much as if they were appointed by the highest public authority. To receive any evidence *ex parte* and irregularly "is against general principles, and is fatal to the award"; and, although they "be nominated, one by each party, still, they are not to consider themselves as representing separate parties, and the advocates of opposite sides; but as called on to execute a joint trust, and to look impartially at the true merits of the matter submitted to their judgment." If, indeed, the parties "waive the right of impartial trial, and purposely and avowedly select" partial persons as arbitrators, the courts, without commending such selections, will not set aside the award merely on that ground; but "if the parties really intend to have their rights decided by impartial judges, they are entitled to insist that each and all of them be impartial"; and "the exercise of undue or improper influence, applied by one of the parties to one or more of the arbitrators, by separate conference, or other ways of approach, is a lawful defence to an action on the award."³

¹ Sharswood, note to Blackstone's Commentaries, Book III, chap. 1, sec. 2. Quoted in *Fargo v. Reighard* (1895), 13 Ind. App. 39, 45, 39 N. E. 888, 890; *Germania Fire Insurance Co. v. Warner* (1895), 13 Ind. App. 466, 41 N. E. 969, 973.

"Arbitration is the submission of some disputed matter to selected persons, and the substitution of their decision or award for the judgment of the established tribunals of justice thus avoiding the formalities, the delay and the expense of ordinary litigation." 2 Ruling Case Law, *Arbitration*, 351 et seq. See, *In re Castle Curtis Arb.* (1894), 64 Conn. 501, 30 Atl. 769; *Guild v. Atchinson, Topeka and Santa Fé R. R.* (1896), 57 Kan. 70, 45 Pac. 82; *Perry v. Cobb* (1896), 88 Me., 435, 34 Atl. 278; *Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227.

² *Railway Co. v. Moore* (1870), 64 Pa. 79, 91; *Omaha Water Co. v. Omaha* (1908), 162 Fed. Rep. 225. In the latter case, at p. 233, it was said: "An arbitration presupposes a controversy or a difference to be tried and decided, and the arbitrators proceed in a judicial way, sometimes as an adjunct to a court of justice. Their investigation is in the nature of a judicial inquiry, and rules of procedure must be strictly observed or their award will be void."

³ *Strong v. Strong* (1852), 63 Mass. (9 Cushing), 560, 570-4. See, also, *Hoosac Tunnel Dock and Elevator Co. v. O'Brien* (1884), 137 Mass. 424, 426; *Collins v. Oliver* (1844), 23 Tenn. (4 Humph.) 439, 440; *Millsaps v. Estes* (1905), 137 N. C. 535, 539; *Producers Refrigeration Co. v. Norwich Union Fire Ins. Co.* (1904), 91 Minn. 210, 213. An arbitration being "a judicial proceeding directly affecting

"In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and deciding the questions embraced in the submission. As incident to the decision of the questions of fact, they have power to decide all questions as to the administration and rejection of evidence, as well as the credit due to evidence, and the inference of fact to be drawn from it. So, when not limited by the terms of the submission, they have authority to decide questions of law, necessary to the decision of the matters submitted, because they are judges of the parties own choosing. Their decision upon matters of fact and law, thus acting within the scope of their authority, is conclusive, upon the same principle that a final judgment of a court of last resort is conclusive; which is, that the party against whom it is rendered can no longer be heard to question it. It is within the principle of *res judicata*, it is the *final judgment* for that case, and between those parties."¹

In many jurisdictions the same effect is given to an award as to the verdict of a jury, and judgment may be entered on it at once.²

Previously to 1920 the practice of arbitration in the United States

the interest of both parties to the submission," the "plainest principles of justice require that the arbitrators ought to be indifferent and impartial men both in sentiment and in action. They are the agents of *both* parties alike, and not one party only; and, like other judges, they are bound to exercise a high degree of judicial impartiality without the slightest regard to the manner in which the duty has been devolved upon them." *Grosvenor v. Flint* (1897), 20 R. I. 21, 26. See, also, *Wood and Co. v. Helm* (1884), 14 R. I. 325, 329.

¹ *Shaw, C. J.*, in *Boston Water Co. v. Gray* (1843), 6 Metcalf (Mass.), 131, 165, 166. Quoted in *In re Curtis and Castle Arbitration* (1894), 64 Conn. 501, 516-517. "It may be considered as well settled that arbitrators, being judges of the parties own selection, have rightfully the power to decide and finally adjudicate the law and the facts of the case submitted to them." *Moore v. Luchess* (1874), 23 Grattan (Va.) 160-4. They are to be considered "as a court of general jurisdiction, so far as relates to the matter submitted." *Vaughn v. Graham* (1848), 11 Mo. 575, 578, 579; *Pearce v. McIntyre* (1860), 29 Mo. 423. "It is the general doctrine pervading our jurisprudence on the subject, that the decision of an arbitrator in a matter within his jurisdiction is final and conclusive between the parties. . . . This general principle is subject to the qualification that awards may be set aside for palpable error of fact, like a miscalculation of figures or mistake of that nature. It may also be set aside for error of law when the question of the law is stated on the face of the award, and it appears that the arbitration meant to decide according to law, and did not." *Fudickar v. Guardian Life Ins. Co.* (1875), 62 N. Y. 392-9.

² *Tennessee Coal, Iron & R. Co. v. Roussell* (1908), 155 Ala. 435, 46 So. 866; *South Carolina Railroad v. Moore & Philpot* (1859), 28 Ga. 398; *Rankin v. Rankin* (1865), 36 Ill. 293; *Wernwag v. Pawling* (1833), 5 Gill & J. (Md.) 500; *Deerfield v. Arms* (1838), 20 Pick. (Mass.) 480; *Morville v. American Tract Society* (1877), 123 Mass. 129; *Underwood v. McDuffie* (1867), 15 Mich. 361; *Lang v. Salliotte and Drouillard* (1890), 79 Mich. 505; *Renaud v. State Court of Mediation and Arbitration* (1900), 124 Mich. 648, 83 N. W. 620; *Day v. Hammond* (1874), 57 N. Y. 479.

That arbitrators are, in the United States, considered as the agents of both parties alike and not in any sense as advocates; that they are judges both of fact and of law, and that their award operates as a final judgment, see *Morse, John T., Jr.*, *The Law of Arbitration and Award*, Boston, 1872, 106, 214, 487.

lagged behind the practice in many other countries because of the fact that the courts, adhering to the old judicial doctrine that individuals could not by private agreement oust the courts of their jurisdiction, held that a clause in a contract by which the parties agreed to submit their differences, if any, to arbitration, was revocable by either at pleasure.¹ In 1920, however, the legislature of New York passed an act making arbitration agreements irrevocable and legally binding, and the awards enforceable as judgments of the court. Similar statutes were afterwards adopted in the States of Massachusetts, New Jersey, Pennsylvania, California, and Oregon; and the Congress of the United States has also passed an act which operates within the Federal jurisdiction. With the opportunity afforded by this legislation, the arbitration of commercial disputes has, with the cooperation of the American Arbitration Association, steadily gone forward, accompanied with a "marked development in the organization and stabilization of arbitral procedure." It appears that, before the end of 1927, in addition to 332 trade associations which had adopted formal rules of procedure, there were 292 which maintained arbitral facilities, while yet 162 other organizations provided informal procedure; that, with the advance of organized arbitration, and the removal of the settlement of disputes from the sphere of executive duties, the tendency to compromise claims had decreased, the parties preferring the submission of their controversies to the final decision of "responsible boards acting under the law" to the use of "conciliation and compromise"; and that, coincidentally, permanent boards were replacing temporary appointees, and eliminating the practice of appointing as arbitrators representatives of the parties with an umpire to decide between them—a practice pointedly condemned by the Court of Appeals of the State of New York.²

It should be observed that the American Arbitration Association, distinctively representing the movement for the arbitration of commercial disputes, has not only refused to be drawn into political or labor controversies, but has also refused to act as a "conciliation body."

The Association has endeavored first of all, "to bring business and the law into accord," by promoting the organization of a simple, direct and inexpensive method of attaining justice, as distinguished from what an eminent lawyer and statesman, the Honorable Elihu

¹ Commercial Arbitration and the Law, by Julius Henry Cohen, of the New York Bar, New York and London, 1918, Introduction, ix.

² The Trend of Commercial Arbitration, Bulletin No. 6, Supplement A, published by the American Arbitration Association, December 1927. The activities of the American Arbitration Association extend to all the American countries, and it has the cooperation of the Pan American Union and of other bodies, governmental and non-governmental.

Root, has described as "the methods of an acute, subtle, logical, finely discriminating, highly trained mind." This description occurs in a passage to which justice can be done only by quoting it in full:

The law is made not for lawyers but for their clients, and it ought to be administered, so far as possible, along the lines of laymen's understanding and mental processes. The best practice comes the nearest to what happens when two men agree to take a neighbor's decision in a dispute, and go to him and tell their stories and accept his judgment. Of course all practice cannot be as simple as that; but that is the standard to which we ought to try to conform rather than the methods of an acute, subtle, logical, finely discriminating, highly trained mind. It is that sort of thing which merchants seek when they get up committees of arbitration to decide their controversies without the intervention of lawyers. They are trying to get their questions settled in accordance with their instincts and habits of thought. That is the way in which all the great international arbitrations are conducted. Fortunately for them, the judicial procedures of the nations differ so widely that there cannot be any particular rules of practice in an international case. Accordingly each country tells its story in print and then both go in and tell the arbitrators about it. Many of these cases are exceedingly complicated and difficult, but they require no complicated and difficult procedure.¹

The Association has sought, in the second place, to secure the cooperation of the judiciary and the bar.² The success of this policy is exemplified in the annual report of the Special Committee on Arbitration, of the Association of the Bar of the City of New York for 1927-1928. In this remarkable and able document it is stated that the committee having observed the propensity of business men to resort to arbitration for the settlement of commercial disputes—as contrasted with what the report calls "litigation"—set about ascertaining the reason for this tendency by sending a questionnaire to a selected group of business men, not comprising secretaries of trade associations, chairmen of committees on arbitration, or other persons who might be supposed to be primarily advocates of arbitration, but

¹ The Layman's Criticism of the Lawyer; an address made by Mr. Root before the American Bar Association, 1914, Reports of American Bar Association, vol. 39, 397: quoted in Cohen's Commercial Arbitration and the Law, 2-3.

² First Annual Report of Mr. Lucius R. Eastman, president of the American Arbitration Association, Dec. 31, 1927. In this report Mr. Eastman speaks of the "inestimable value of the support which the New York Judiciary gives to arbitration by the manner in which it is upholding the Arbitration Law and by the liberality of its interpretation of that law. I venture to say," he continues, "that nowhere has the historical antagonism of judges, prevalent under the English common law, so completely disappeared." He also comments upon the more cordial attitude of members of the bar, who were coming to realize that arbitration was a mode of trial which afforded immediate relief to their clients.

comprehending important officers of established businesses and frequently men of national reputation, and representing at least twenty-six different lines of industry. In many instances the replies seemed to be based on experience in several fields of commerce. The responses, which numbered sixty-five, were practically unanimous in declaring that the parties involved were generally satisfied both with the procedure and with the results of arbitration, while they were four to one in declaring that the parties to commercial disputes were not satisfied with litigation. In the expression of a preference for arbitration over litigation in the settlement of trade disputes, although in less than one-third of the organizations was arbitration compulsory, the responses were unanimous, and there was a strong expression of sentiment in favor of arbitration even for the settlement of disputes of other classes. One consideration that appealed most strongly was the finality of the award, only a sixth of the responses favoring an appeal to a trade board of appeal, and less than a ninth an appeal to the courts of law on legal questions. Only one expressed the view that it was undesirable for arbitrators to determine questions of law. Moreover, the report states that, while the responses generally indicated appreciation of the fact that arbitrators "were not legally bound or limited by rules of law," there was "practical unanimity that this fact is in practice a desirable feature of arbitration." Other advantages thought to be offered by arbitration were its relative inexpensiveness, the latitude allowed to arbitrators in directing the parties to do particular acts or to make allowances, and the feeling that, while the decisions of arbitrators were more accurate upon questions of fact than the decisions of courts or juries, the hearings were marked by a general absence of irritation and animosity.

On the strength of these facts the committee concluded that there was "a crying need for improvement and reform in the general field of litigation," embracing not only "improved and simplified mechanics and procedure" but also "an altered psychology on the part of the bench and bar." In this connection the report stated that it was not unusual in commercial organizations to find a rule excluding lawyers altogether from participation in the hearings. The report says:

It seems to be reasonably clear that aside from the ultra-legalistic and technical psychology which is so often evidenced by bar and bench alike and which appears to be so keenly resented by business men, the chief defects in litigation are to be found in the field of procedure and the law of evidence. For our purposes these may be

conveniently divided into the following: (1) commencement of the action; (2) proceedings before trial; (3) the trial, excluding evidence; (4) problems connected with the jury system; (5) evidence; (6) proceedings after trial including appeals.

If we again refer to the evidence supplied by the replies to our questionnaire, which we may say confirms to a very large extent opinions which we have reached during the past four years of study, it becomes apparent that the methods of arbitration possess distinct advantages throughout this entire field of classification, when applied to the settlement of commercial disputes, over the procedure of litigation as at present established and practiced. We believe, as we have repeatedly said, that the bar ought to give attention to this situation. We believe that the public interest demands that such reform should be introduced into the processes of litigation, especially affecting commercial disputes, as will substantially remove the existing condition of inefficiency and inferiority. We are not prepared to admit that it is beyond the power of the bar to establish and maintain a judicial system for the settlement of commercial disputes which shall be equally simple, effective and just as the private system of arbitration established and maintained by commercial bodies.

I have given a certain prominence to the foregoing report, because its conclusions, and the facts, tendencies and developments on which they are based, have a direct and profound bearing upon proposals, on the one hand, to make the judicial settlement of international disputes so legalistic as to exclude the employment even of the methods of reasoning and of deduction by which rules of customary law, including international law, have immemorially been evolved and applied by national as well as by international courts, and, on the other hand, to divest arbitration of its essential character as a judicial process and convert it into a process of conciliation. As nations are but aggregations of human beings, whose instinct of justice is fundamentally the same in all circumstances, it is no less important in the international than in the national sphere to maintain institutions responsive to manifest human needs and desires.

2. IN INTERNATIONAL LAW

(1) TESTIMONY OF AUTHORITIES

According to international practice, the settlement of differences between independent states may be sought either by amicable methods or by measures of coercion. With coercive measures, running all the way from retorsion, or retaliation in kind, which may, in form and effect, be relatively mild, to the extreme of violence called general war, we are not now concerned. Of amicable methods there are two

kinds, first, the diplomatic, embracing negotiation, good offices, and mediation; and secondly, the judicial, with which we are now pre-occupied.

The judicial method consists in the adjudication, or judicial determination, of the questions at issue either (a) by the decision of a tribunal previously in existence and not appointed by the parties, or (b) by the decision of a tribunal appointed by the parties.

Of a tribunal of the former kind, there is as yet no unmixed example. The nearest approximation is the Permanent Court of International Justice; but, even there, if only one of the contending parties, or if neither of them, already has on the bench a judge of its own nationality, the Statute (article 31) gives to each party not having such a judge the right to appoint one *ad hoc*, and this right has been constantly exercised by one of the parties, or by each of them, as the case may be. It is interesting to observe that, in the notable arbitration, under the treaty between Great Britain and Venezuela of February 2, 1897, of the boundary between British Guiana and Venezuela, by a tribunal appointed by the parties, one of them, Venezuela, had no judge of its nationality on the bench, which consisted of two justices of the British Supreme Court of Judicature, named by the Juridical Committee of the Privy Council; the Chief Justice and an associate justice of the Supreme Court of the United States, named by the President of Venezuela; and a fifth jurist, M. de Martens, of St. Petersburg, chosen by the other four as a member and president of the tribunal.

The tribunal appointed by the parties may be a tribunal created by them for the occasion. On the other hand, it may be a tribunal already fully in existence. It may have been constituted by the parties themselves. It may have been constituted wholly by others, as happened in a case submitted to the French Court of Cassation, the highest judicial tribunal in France; or it may have been constituted by one of the parties, as happened when another case, to which France herself was a party, was also submitted to that court. While the court did not in either of these cases cease to act as a judicial body, it acted not involuntarily, under and by virtue of the national laws under which it was constituted, but voluntarily, under and by virtue of the international agreements under which the cases were submitted to it. The situation was similar when France and Brazil submitted to the Swiss government the determination of their dispute concerning the boundary between Brazil and French Guiana. In these instances the tribunals chosen were national bodies; but it is obvious that the condition of things would not have been essentially

different if the previously constituted tribunals named and empowered by the parties to decide between them had been international bodies.

The process of adjudication by a tribunal appointed by the parties, whether its membership be national, bi-national or mixed, and whether previously constituted or named for the occasion, is technically known as arbitration, and the decision is commonly called an award. To this process, which is of ancient origin, we owe the great bulk of the thousands of international adjudications heretofore made. These adjudications, although they brought "peace with honor" in their own time, are now to a great extent obscured by the mist of years; and it is one of the objects of the present work to collect, preserve and explain them, and thus to make them useful for the advancement of justice through law, in the present and in the future.

Three suppositions have in very recent times specially figured in arguments against the usefulness of arbitration as a method of settling international disputes. The first is that justice according to law cannot be administered without permanent and professionally trained judges; the second, that justice can be judicially administered only under compulsory jurisdiction, and independently of the will of the parties; the third, that rules of conduct can have legal validity only so far as they are prescribed and enforced by a superior power. These suppositions, to the extent to which they appeal to uninformed susceptibilities, have been readily accepted. The third properly belongs to an examination of the nature of international law. The first and second will be disposed of immediately.

For a long while philosophical speculation as to the origin of the administration of justice pictured the head of the family or of the tribe as the original maker and dispenser of law. This idyllic conception is now discredited. Learned investigations have led scholars to conclude not only that the earliest European court was not patriarchal but popular,¹ but also that, long after juridical organization came into existence, and the administration of law had reached an orderly stage, the appeal to a court was voluntary, as was likewise the acceptance of its sentence, even where the parties had vowed to be bound by it, or had put at stake a sum of money to be paid, in case of defeat, to the adversary or to the community.²

The ancients developed their systems of law without professionally trained judges, and this was substantially so of republican Rome. The judges (*judices*), to whom the normal type of case was referred

¹ Smith, Munroe, *A General View of European Legal History*, 340.

² Lammasch, *Das Völkerrecht nach dem Kriege*, 64 et seq.

by the magistrates for the trial of specific issues, were chosen from a panel of laymen, generally composed of the more substantial citizens of the community. It was out of such conditions that there emerged, by a process of natural selection, the class of law-finders, men who studied and knew the law, called by the Romans jurists or juriconsults and by the Germans wise men or law-speakers. At a critical period in the evolution of the Roman law the juriconsults, who, as unofficial and honorary advisers, furnished the law to magistrates and to judges, and also gave legal advice to individuals, guided the interpretation and development of the law.¹ It is on the strength of these facts that the statement has been made that "the Roman law was evolved and perfected without a permanent judicial body."² It was only under the empire, and after the law had become highly developed, that a jurist was selected as chairman of the court and the modern type of tribunal appeared.³ The course of evolution has been compactly summed up as follows:

Law and legal justice can exist without a profession of judges or advocates; and where a legal profession exists, its divisions, and the relation of its branches to one another, have varied and still vary to a wide extent in highly civilized countries and down to our own times. . . . In England it does not appear that before the Norman Conquest there was any distinct legal profession at all, and in the succeeding Anglo-Norman period there were professional or at any rate skilled judges, but no professional advocates. . . . It is the administration of justice with some sort of regularity that marks the existence of law, not the completeness of the rules administered, nor any official character of those who administer them.⁴

As in the municipal, so in the international sphere, the existence of permanent judicial organs, although it may promote the administration of justice, is not essential to such administration or to the development of law in connection with it; to say nothing of the fact that, after permanent organs have been established, submission to their jurisdiction may continue to be in the main voluntary.

In the absence of something in the nature of a super-State, all judicial proceedings between nations must in essence be what arbitration was in Roman law and what it is in international law, no matter whether the tribunal be specially appointed for the occasion, or whether it has a permanent personnel appointed in advance.

With a view to dissipate the confusion sometimes exhibited as to

¹ Smith, Munroe, *A General View of European Legal History*, 340-2.

² Macdonell, Sir John, *Historical Trials*, 6.

³ Smith, Munroe, *A General View of European Legal History*, 342.

⁴ Pollock, *Jurisprudence*, 4th ed. 1918, 8.

the respective functions of mediation and arbitration, I ventured twenty years ago to say:

These methods are often discussed as if they were practically the same, but in reality they are fundamentally different. Mediation is an advisory, arbitration a judicial, function. Mediation recommends, arbitration decides. While nations might for this reason accept mediation in various cases in which they might be unwilling or reluctant to arbitrate, it is also true that they have often settled by arbitration questions which mediation could not have adjusted.

It is, for example, hardly conceivable that the question of the Alabama claims could have been settled by mediation. The same thing may be said of many and indeed of most of the great number of boundary disputes that have been settled by arbitration. The importance of mediation as a form of amicable negotiation should not be minimized. The Congress of Paris of 1856, as well as the Congo Conference of 1884, made a declaration in favor of the practice of mediation; and a formal plan of mediation forms part of the convention lately adopted at The Hague for the settlement of international disputes. Nevertheless, mediation is merely a diplomatic function and offers nothing new.

Arbitration, on the contrary, represents a principle as yet only occasionally acted upon, namely, the application of law and of judicial methods to the determination of disputes between nations. Its object is to displace war between nations as a means of obtaining national redress, by the judgments of international judicial tribunals; just as private war between individuals, as a means of obtaining personal redress, has, in consequence of the development of law and order in civilized states, been supplanted by the processes of municipal courts.¹

In discussing the subject of international arbitration, we are therefore to exclude from consideration, except as a means to that end, mediation, good offices, and other forms of diplomatic action. The testimony of authorities to this effect is practically unanimous.

Grotius, as "the father of international law," may properly be quoted first. Discussing in his great work the subject of arbitration, he says:

Sec. 46, 1. Of arbitrations there are two kinds, as Proculus teaches us; one, in which, whether the decision is just or unjust, we must submit to it; which is the rule, he says, when we come to arbitration by a compromise; another, in which the matter is reduced to the decision of a fair man. . . . An arbitrator may be taken in two different ways, either as a mediator only, as we read that the Athenians were between the Rhodians and Demetrius; or as one whose decision is to be absolutely obeyed. And this latter is the

¹ Moore, *Digest of International Law*, VII. 24-5. See, also, "Arbitration" as a Term of International Law, by Thomas Willing Balch; reprinted from the *Columbia Law Review*, November and December, 1915.

kind of which we here speak, and of which we have already said somewhat, when we spoke of the means of obviating war.¹

In the next paragraph Grotius maintains that, while the Civil Law in some respects permits an appeal from arbiters, this cannot take place between kings and peoples, since there is no superior power which can break or relieve them from the tie of their promise to abide by the result; and he adds:

And therefore they must stand by the decision, whether it be just or unjust; so that, as Pliny says, *When you choose a person your umpire, you make him your supreme judge*. For the discussion of the office of an arbiter is one thing, and that of the duty of persons who make a compromise is another.²

Recurring, then, to the nature of the office of the arbitrator, Grotius says:

1. In considering the office of an arbiter, we must consider whether he be elected into the place of a judge, or with some laxer

¹ Whewell's Grotius, Lib. III, cap. 20, sec. 46, par. 1. The original reads as follows: "Arbitratorum Proculus nos docet duo esse genera: unum ejusmodi, ut sive æquum, sive iniquum, parere debeamus, quod observatur, ait, cum ex compromisso ad arbitrum itum est: alterum ejusmodi, ut ad boni viri arbitrium redigi debeat. . . . Utrovis modo arbitrum sumi posse, aut ut conciliatorem tantum, quales Athenienses inter Rhodios et Demetrium fuisse legimus, aut ut cujus dicto parendum omnino sit. Et hoc est genus de quo nos hic agimus, et de quo nonnulla supra diximus cum de cavendi belli rationibus loqueremur." Among the many translations of Grotius, I have compared that of Whewell with that by Evats, published in London in 1672, pp. 552-3, and with the translation, published in London in 1787, of Barbeyrac's edition, pp. 709-10, and have given Whewell's the preference. It will be observed that Grotius makes the rendering of an obligatory decision the test and proof of the character of the arbitrator, of whom he himself speaks. If the person called in was not to render such a decision, he was not, properly speaking, an arbitrator, but only a mediator; there was not arbitration, but only mediation.

It may be observed that the word "compromise," in the sense in which it is used in Whewell's text, as the equivalent of the Latin *compromissum*, or the French *compromis*, meaning an agreement to submit a matter to arbitration, is practically obsolete and tends to mislead. *Compromissum* and *compromis* in no respect signify a "compromise," as that word is now generally used and understood; they mean an agreement of arbitration, or arbitral agreement, and should be so translated, so as to avoid misunderstanding.

For a comment on the word *compromis* by Pradier-Fodéré, see *Le droit de la guerre et de la paix* par Grotius, nouvelle traduction par M. P. Pradier-Fodéré Paris, 1867, II. 555.

² Whewell's Grotius, Lib. III, cap. 20, sec. 46, par. 2. The original of the passage just quoted reads: "Standum ergo omnino, sive æquum, sive iniquum pronuntiaverint, ita ut Plinii illud huc recte aptes: *summum quisque causæ suæ judicem facit, quemcunque eligit*. Aliud enim est de arbitri officio, aliud de compromittentium obligatione quærere."

With reference to the words "just or unjust," Barbeyrac says: "Our author undoubtedly supposes that there is neither fraud nor collusion on the side of an Arbitrator. See Pufendorf, *Law of Nature and Nations*, B. V. chap. XIII, §4, with which place it is necessary to compare this whole subject." Grotius, *The Rights of War and Peace*, with Notes by Barbeyrac, London, 1787, 710.

power, which Seneca speaks of as the proper power of an arbiter: *The judge is limited by rules of law: the umpire is left quite free, and can soften law and justice by kindness and mercy.* So Aristotle says, *That a fair man will rather go to an arbiter than to a judge, because the arbiter looks to equity, the judge to law.*

2. In this place, *equity* does not mean, as elsewhere, that part of justice which interprets the law by its general tendency and real purpose, (for this part also is committed to the judge;) but it means everything which is better done than not done, even extraneous to the rules of justice, properly so called. Such arbiters are frequent, in cases between private persons and citizens of the same empire; and are especially commended to Christians by St. Paul, 1 Cor. vi.; but in a doubtful case, we are not to suppose that so much power is assigned to them. For in doubtful cases we assume as little as may be. And this especially holds, between parties who have supreme authority; for these, since they have no common judge, are to be supposed to have bound the arbiter by the rules by which the office of a judge is commonly bound.¹

Pufendorf, whose authority Barbeyrac specially invokes in one of his notes to Grotius, treats at length of the functions of the arbitrator, and, after presenting him as a judge to whose determination the parties are obliged to submit without reserve or appeal, discusses the question whether he should decide according to the law or should assume to mitigate its severity. On this point, taking a position substantially identical with that of Grotius, he says:

If it be doubtful under which of these two Qualifications the *Arbitrator* is chosen, he ought to suppose himself tyed up to those Rules, which a Judge would be obliged to follow: for it is for want of a Judge and Judicature that he is called in: And, in a doubtful case, we ought to take that side which is clearest. Besides, An Arbitrator can't so easily act unjustly, if he has a limit, as if he has an absolute Power delegated to him.

"To persuade a mitigation of the Rigour of the Law is," declares Pufendorf, the business of those "who voluntarily, without entering into any Engagements, interpose, as common Friends, between the contending Parties," and "endeavour, by their Authority and their Arguments and Intreaties, to bring them to Terms of Accommoda-

¹ Whewell's Grotius, Lib. III, cap. 20, sec. 47, par. 1 and 2. The original of the second paragraph reads: "Quo in loco æquitas non proprie significat, ut alibi, partem illam justitiæ, quæ legis sonum generalem ex mente auctoris adductus interpretatur, (nam hæc et judici commissæ est) sed omne id, quod rectius fit quam non fit, etiam extra justitiæ propriæ dictæ regulas. Sed tales arbitri sicut inter privatos et ejusdem imperii cives frequentes sunt, et specialiter Christianis commendantur ab Apostolo Paulo I. Cor. vi. ita in dubio non debet tanta potestas concessa intelligi: in dubiis enim, quod minimum est, sequimur: præcipue vero id locum habet inter summam potestatem obtinentes, qui cum judicem communem non habeant, arbitrum censendi sunt adstrinxisse iis regulis, quibus judicis officium adstringi solet."

tion"; but these, he says, are *Mediators*, and "not properly *Arbitrators*."¹

Burlamaqui, Swiss philosopher, jurist and councilor of State, so closely follows Grotius, both in opinion and in the citation of authorities, that a presentation of his text would be little more than a repetition of what was said by the Dutch jurist.²

Vattel, renowned Swiss authority, whose work, distinguished alike for clearness of reasoning and felicity of style, has had an almost unrivaled vogue, contrasts mediation with arbitration, and, while declaring that the mediator "ought to observe an exact partiality," to "favor what is right," and to see that "each one gets what belongs to him," says:

But he should not scrupulously insist on rigorous justice. He is a conciliator, and not a judge: his business is to procure peace; and he should persuade him who has the right on his side to concede something, if it is necessary, with a view to so great a blessing.

Speaking, on the other hand, of arbitration, Vattel says:

When sovereigns cannot agree on their claims, and yet desire nevertheless to maintain or to restore peace, they sometimes confide the decision of their differences to arbitrators, chosen by common accord. When the arbitral agreement is made, the parties should submit to the sentence of the arbitrators; they have engaged to do this, and the faith of treaties must be preserved.³

¹ Pufendorf, *The Law of Nature and Nations*, Oxford, 1710, 435-6. The original work was published in 1672.

² Burlamaqui, *Principes du droit de la nature et des gens*, ed. par M. Dupin, Paris, 1820, Vol. 3, chap. xvii, 490 et seq. Burlamaqui says that, "in case of doubt, the arbitrator is bound to follow strictly the rules of justice," and adds: "It is clear that, in a dispute between two citizens of the same State, the arbitrator can regularly judge only according to the civil laws, to which both parties are subject. But when the parties do not recognize here below a common tribunal, the arbitrator must be guided by natural laws, unless the parties have consented to conform to the positive laws of some State." The intelligent reader will not be led by the phrase "natural laws" to suppose that Burlamaqui meant here to refer to anything but the law by which he maintained that nations were bound.

The work of Burlamaqui, translated by Nugent in 1748 under the title of *The Principles of Natural and Politic Law*, preceded the larger work, from which I have here quoted, and contained only a passing mention of arbitration. See Philadelphia edition of Nugent, 1832, II. 185.

³ These translations are made from Vattel, *Le droit des gens*, Neuchatel, 1773, which, treating of the function of the mediator, says: "Son devoir est bien de favoriser le bon droit, de faire rendre à chacun ce qui lui appartient; mais il ne doit point insister scrupuleusement sur une justice rigoureuse. Il est conciliateur & non pas juge: sa vocation est de procurer la paix; & il doit porter celui qui a le droit de son côté, à relâcher quelque chose, s'il est nécessaire, dans la vue d'un si grand bien . . ." tome I, liv. II, chap. xviii, par. 328. The passage on arbitration reads: "Quand les souverains ne peuvent convenir sur leurs prétentions, & qu'ils désirent cependant de maintenir, ou de rétablir la paix, ils confient quelquefois la décision de leurs différens à des arbitres, choisis d'un commun

It is interesting to note that international arbitration has very recently been the subject of an extensive examination by another Swiss writer. Dr. Gossweiler, of the Geneva bar, who, after defining international arbitration as the settlement of disputes by persons or great States (*grands Etats*) who are appointed by the litigant states in common accord, and who render a judgment (*sentence*) based on law (*fondée sur le droit*), and remarking that some writers confound "arbitration" with "compromise," says:

That which distinguishes arbitration from other amicable methods of deciding disputes is its judicial character (*caractère judiciaire*). There is a fundamental difference between arbitration on the one hand and mediation and good offices on the other. In arbitration the parties agree in advance to submit to the sentence, while in mediation and good offices the third party only makes an attempt to reconcile the parties, who are in no respect bound by any relation. . . . The mediator is not bound by the rules of international law, he does not seek to give a juridical solution, he endeavors to bring about a compromise. . . . The arbitrator, on the contrary, pronounces a *sentence*, which is binding on the parties to the litigation.¹

It may be observed that, as between the Swiss Cantons, there existed from early times a method of settling disputes which combined, in the sense of using alternatively, mediation and arbitration, without merging or confounding them. This institution has lately been the subject of a special study,² and is still undergoing investigation.

accord. Dès que le compromis est lié, les parties doivent se soumettre à la sentence des arbitres; elles s'y sont engagées, & la foi des traités doit être gardée . . . " Id. par. 329.

¹ Gossweiler, C. H., *L'Arbitrage international avant 1914 et après 1919*, Genève, 1923, 29, 31, 32. The learned author, while saying (p. 32) that arbitration in principle presupposes the existence of a principle of a legal nature (*ordre juridique*), of a point of law or of fact to be determined, remarks that, in the absolute lack of strict rules of law, the arbitral tribunal may, if the parties agree to it, base its sentence on considerations of equity. The very same power, it should be observed, is expressly given by Article 38 of the Statute of the Permanent Court of International Justice, which, as the learned author says, constitutes, so far as concerns the members of the League of Nations who have accepted its obligatory jurisdiction, a true court of justice, the jurisdiction of which only one of the parties may invoke. He prophesies that this court is destined to replace "arbitration properly so-called," but adds: "Nevertheless, our conclusion is that international arbitration, in the strict sense of the word, will still preserve for a long time its importance, especially for the settlement of disputes which, by reason of their nature, are not susceptible of solution in a purely legal way" (*par la voie juridique pure*).

² Usteri, Emil, *Das öffentlich-rechtliche Schiedsgericht in der schweizerischen Eidgenossenschaft des 13.-15. Jahrhunderts*. Zürich, 1925. See, also 35 Niemeyer, *Zeitschrift für Internationales Recht* 1925, 135, 142.

As to early arbitration in Northern Italy, see Frey, Siegfried, *Das öffentlich-rechtliche Schiedsgericht in Oberitalien im XII. und XIII. Jahrhundert*, Luzern, 1928.

In France, international arbitration has been encyclopaedically defined as a method of peaceful settlement by which the parties to a dispute, having in vain sought to resolve it by negotiation, and being desirous to avoid recourse to arms, delegate by common accord the task of determining it to an arbitrator, and morally bind themselves to submit to his decision. This moral understanding is said to be the essential characteristic of arbitration, and alone suffices to distinguish it from mediation, the mediator confining himself to making conciliatory proposals, which the parties are free to accept or to reject, while the arbitrator decides the question submitted to him, and his sentence binds those who have invoked it.¹

Dalloz, concisely defining international arbitration as the procedure to which the States resort, when, after failing to resolve a dispute by negotiation, they agree in requesting a third party, of their own common choice, to decide it, says that the arbitrator, as distinguished from the mediator, renders a judgment in the true sense (*une sentence proprement dite*).²

The subject of international arbitration has been discussed, sometimes extensively, by many French writers.

Garden states that the arbitrator pronounces a true binding judgment (*un véritable jugement obligatoire*), while the mediator can only give advice and counsel.³

Rayneval uses the same language, and adds that, as the arbitrators receive a power which authorizes them to pronounce definitely on the differences dividing the parties, they fulfil the functions of judges (*ils remplissent les fonctions de juges*).⁴

Of this opinion also is Rouard de Card, who, in a special volume on international arbitration, in its historical and legal aspects, declares that, while it is the task of the mediator to effect an arrangement, the arbitrator discharges the functions of an actual judge (*les fonctions d'un véritable juge*); and that the arbitral tribunal is a jurisdiction (*jurisdiction*) composed of real judges.⁵ In another work, fifteen years later, he adds the statement that arbitrators have generally been entrusted with the mission of judging according to the princi-

¹ La grande encyclopédie, Paris; *Arbitrage*, II. Droit international. Reference is made to the fact that when the parties, being in agreement on the point of law, contest only the facts, there is *arbitration*, that is, a sort of expert appraisal, and not *arbitrage*, or arbitration in the full sense.

² Dictionnaire, *Arbitrage international*, 89.

³ *Traité de la diplomatie*, I. 436, note.

⁴ Rayneval, Gérard de, *Institutions du droit de la nature et de gens*, Paris, 1832, tome II, chap. xxii, 110–11.

⁵ Rouard de Card, M. E., *L'Arbitrage international dans le passé, le présent et l'avenir*, Paris, 1877, 29–53.

ples of international law (*d'après les principes de droit international*).¹

Funck-Brentano and Sorel, writing in 1887, said that, of all the means proposed for the pacific settlement of disputes between States, arbitration was the only one which had produced satisfactory results and which tended to introduce itself, in a practical form, into the customs of the law of nations (*dans les coutumes du droit des gens*); and that the practice of arbitration constituted a real advance in the law of nations (*un des progrès réels du droit des gens*).²

In 1895 Mérygnac, in one of the most learned, intelligent and discriminating works on international arbitration ever written, comments upon the essential differences between the settlement of disputes between citizens of the same State and the settlement of disputes between States themselves, the former being judged by a pre-existing judicial power, whose decisions are executed by the public force, while, as between States, there is, in principle, a lack of common laws (*lois*), of common courts, and of a common public force, to say nothing of the complexity of interests involved in disputes between States, and the fact that each epoch furnishes something peculiar to it—religion in one age, colonial competition in another, and so on. He treats of arbitration as a means of bridging these differences.³

Referring, in the course of his discussion, to the powers conferred on arbitral tribunals to fix their procedure, he says:

¹ Les destinés de l'arbitrage international depuis la sentence rendue par le tribunal de Genève, Paris, 1892, 210.

Piédelièvre, R., says that arbitration is the legal way (*la forme juridique*) of peacefully solving international disputes. Précis de droit international public ou droit des gens, Paris, 1895, II. 18.

Féraud-Giraud, L. J. D., adopts the statement of M. Flourens, Minister of Foreign Affairs of France, that arbitration is the best means of safeguarding the principles of law (*principes du droit*) and the legitimate susceptibilities of peoples. Etats et souverains, Paris, 1895, I. 152.

Dumas, Jacques, speaks of the final triumph of law (*triomphe final du droit*). Les sanctions de l'arbitrage international, Paris, 1905, 415.

Bonfils, Henri, says that arbitrators render a true judgment (*une véritable sentence*), and that they are, as a general rule, entrusted with the duty of deciding according to the general principles of the law of nations (*les principes généraux du droit des gens*), unless the parties lay down in the arbitral agreement special rules. Manuel de droit international public, 7th ed. Paris, 1914, 646-55.

Despagnet, F., places arbitration among legal solutions (*solutions juridiques*). Cours de droit international public, Paris, 1894, 699.

Mougins de Roquefort, Ch. de, says that modern authorities concede to arbitration a legal character (*caractère juridique*). De la solution juridique des conflits internationaux, Paris, 1889, 195.

See also, Marès, Adrien, Essai sur l'évolution de l'idée d'arbitrage international, Montpellier, 1925, 10, 17, 18.

² Funck-Brentano, Th., et Sorel, Albert, Précis du droit des gens, 2d ed. Paris, 1887, 458, 460.

³ Mérygnac, A., Traité théorique et pratique de l'arbitrage international: Le rôle du droit dans le fonctionnement actuel de l'institution et dans ses destinées futures, Paris, 1895, Préface.

In these different cases, the arbitrators are authorized to determine the procedure they wish to follow; and arbitral commissions, in executing the treaties which established them, have drawn up regulations for their operations. While they have thus the liberty to conduct themselves as they understand, arbitrators should act in the spirit of the general rules followed in the administration of justice and calculated to assure to their decisions the respect and authority which attach to judicial decrees (*sentences judiciaires*) regularly rendered.¹

Farther on the learned author deals with the question of the power of the arbitrator to determine what he may or may not adjudge, and states the following conclusion:

What should be thought of a plea to the jurisdiction (*exception d'incompétence*) raised before an arbitral tribunal? If, by saying that arbitrators are judges of their own jurisdiction (*compétence*), we mean that they have the right to decide that a question which it is desired to withdraw from their examination is or is not within the terms of the arbitral agreement, we certainly utter an indisputable truth. The arbitrator, made judge of the merits of the case, must therefore, *ipso facto*, be considered as invested with the right to decide of what it consists; if this were otherwise, he would be obliged to give up the case whenever one of the parties raised the claim that he could not take cognizance of a question, even though it should be clearly included in the treaty. Hence, the arbitrator has the right to decide what points come or do not come within the arbitral agreement, and what he accordingly may or may not adjudge; this is not a question of jurisdiction (*compétence*) but a question of merits; and this is so before the ordinary jurisdiction (*jurisdiction*) as well as before the international tribunal.²

Ten years later, Mérignhac, recurring, in a general treatise on international law, to the subject of arbitration, observes that authors generally hold that arbitration, as distinct from mediation, applies only to differences of a legal nature (*ordre juridique*), which consequently would exclude differences of a political nature (*ordre politique*); but he properly thinks that a definite and permanent line cannot be drawn between these two classes of questions; and he therefore not unnaturally condemns the class of treaties, avowedly contracted for the purpose of making arbitration compulsory, which, while providing for the submission only of questions of a legal nature, comprehensively except from that limited obligation questions affecting the independence, the vital interests, or the honor of the contracting parties, or the interests of third powers. He proposes, in place of this, a clause embracing "all differences" (*tous les différends*), present

¹ Mérignhac, A., *Traité théorique et pratique de l'arbitrage international: Le rôle du droit dans le fonctionnement actuel de l'institution et dans ses destinées futures*, Paris, 1895, Préface, 246, §245.

² Id. 254, §257.

or future, between the contracting parties, except those involving their independence or affecting the interests of third powers.¹

The general arbitral clause (*clause compromissoire*), incorporated in numerous commercial and other treaties, for submission to arbitration of any dispute which may arise as to the interpretation or application of any of their stipulations, he commends, saying that it has the inestimable advantage of prescribing recourse to arbitration in advance of the appearance of the dispute, so that, the moment it appears, the parties are bound to determine it by juridical methods (*voies juridiques*).²

With reference to the repeated affirmation, by the authorities heretofore cited, of the juridical nature of the arbitrator's office, and the judicial quality of his judgments, it will be useful at this point to take notice of certain observations of another French writer, Pradier-Fodéré, who, speaking in technical legal phraseology, says that arbitration is not a *mandate* (*mandat*), or a *delegation* (*délégation*), or an *act* (*acte*), by which the parties agree to cause their differences to be judged by an arbitrator;³ but that it is simply a means of peacefully resolving international differences, consisting in the examination and decision of a determinate dispute in a precise manner, entrusted by the parties, freely and in common accord, to one or more disinterested third persons who accept the mission. He further states that what distinguishes arbitration from other amicable means of resolving differences between States, is its *semi-judicial* character (*caractère semi-judiciaire*); and he says he calls it *semi-judicial* because, although we commonly speak of the arbitral court, and the arbitral sentence, arbitrators are not *judges* (*juges*), and their decisions are not *judgments* (*jugements*), "in the proper and juridical sense of the word."⁴

¹ Mérignhac, *Traité de droit public international*, Paris, 1905, 484-8.

² *Id.* 472.

³ *Mandat* is defined by Dalloz as signifying, in its most general sense, the contract by which one person, called the principal, gives to another, called the agent, the power to do one or more legal acts, whether in the name of the principal, or simply in his place and stead, (*le contrat par lequel etc.*: Répertoire pratique de législation, de doctrine et de jurisprudence, Paris, 1910). Practically the same definition is given in *La grande encyclopédie*, and in *Nouveau Larousse illustré*.

Délégation is variously defined as a commission by virtue of which one acts for another in a determinate matter; as a delegation of powers or functions; as the act by which the direct depositary of public power transfers to another functionary the exercise of all or a part of such power; as the act or deed by which a debtor assigns a debt due to himself to his creditor, for the purpose of paying the latter. Dalloz, *Répertoire*; *La grande encyclopédie*; *Nouveau Larousse illustré*.

Acte, derived from the Latin *actus*, *actum*, signifies anything done in public or in private law; also, the writing showing that a thing has been agreed to or acknowledged. *Ibid.*

⁴ Pradier-Fodéré, F., *Traité de droit international public*, Paris, 1894, VI. 324, 376, §§2602, 2609.

It is obvious that Pradier-Fodéré's entire comment proceeds from the conception, drawn from municipal law, that, where there is no power to judge derived from superior authority (*jurisdiction*), there can be no judge (*juge*), no judgment (*jugement*), no judicial act (*acte judiciaire*), in the full legal sense.¹ The conclusion naturally follows from the hypothesis; but, if the hypothesis be accepted, the conclusion also follows that there can be no international judicial tribunal of any kind in a proper sense, no matter what its form or constitution may be, so long as there is no super-State. The hypothesis is directly allied to that of the school of analysts, preeminently represented by John Austin, who conceive that, because there exists in the international sphere no superior authority to prescribe rules of international conduct and enforce obedience to them, international law, which rests upon the common consent of nations, is to be considered not as law in a proper sense, but only as international morality.

The views of Pradier-Fodéré in these particulars are partly, but not wholly, shared by Gossweiler, the recent Swiss writer, to whom reference has heretofore been made.² The latter, while unreservedly affirming that arbitration is distinguished from other methods of peaceful settlement by its "judicial character" (*caractère judiciaire*), and that the arbitrator pronounces a sentence binding on the parties, remarks that, as arbitrators are not "judges" (*juges*) in the "legal sense" (*sens juridique*) of the word, their decisions (*décisions*) are not judgments (*jugements*) but awards or decrees (*sentences*); that the judicial character of arbitration flows not from the "nature" (*la nature*) of the process, but from the "will" (*volonté*), or, as he says in another place, the "free will" (*libre volonté*), of the parties; and that, consequently, either party has the right to rescind an arbitration agreement in the future, provided he conforms to its stipulations in that respect. He therefore criticises Fiore, who will hereafter be cited, for saying that the arbitral tribunal, once constituted, must be considered *ipso facto* as a true juridical body, and Bluntschli for saying that the arbitral tribunal, although it holds its powers from the parties, has nevertheless a jurisdiction (*compétence*) of its own and its decisions are absolutely binding.³

So prone is the human mind to distinctions that even those who share them seldom draw from them identical conclusions; but it is

¹ The distinction is clearly stated by Littré, who, after defining *jurisdiction* as the power of the judge, of him who has the right to judge (*pouvoir du juge, de celui qui a droit de juger*), quotes a classical French law dictionary to the effect that an arbitrator is a kind of judge who has no *jurisdiction*, except what the parties give him by virtue of the arbitral agreement.

² *Supra*, xliii.

³ Gossweiler, *L'Arbitrage international*, 32, 33.

evident that the distinctions just noted relate to the source of the arbitrator's power rather than to its nature. This has recently been set forth very clearly by a French writer, who, after stating that the arbitral decision has the character of a judicial solution (*solution judiciaire*), says:

A question has been raised whether arbitrators are judges and their sentence a true judgment (*un véritable jugement*) because, it is said, they do not hold their power from a superior authority but from the will of the parties; if the award is obligatory, it would be because of the arbitral agreement, a real contract by which the States have decided upon arbitration and bound themselves to execute the award. This argument is unfounded. The magistrates charged to render justice in a country are not superior to the government, but the latter, nevertheless, is bound to accept and execute their sentence. That the arbitrators are, or are not, named by the parties, signifies but little. The essential thing is that the power to judge them is recognized.¹

The subject is presented with equal clearness and precision by the German authority, Ullmann, who, in his work on international law, maintains that the judicial settlement of international disputes is not excluded by reason of the lack of a judicial authority and executive force standing above the State. On the contrary, such settlement is, he affirms, possible, and has been resorted to at all times, in the form of arbitral awards. The agreement by which the contending parties mutually undertake to submit their dispute to an arbitral tribunal—a single arbitrator or an arbitral board—answers the purpose of international law as the law of independent States, to bring the dispute to a judicial settlement, by peaceful means, through legal process and judgment.²

In accord with this view is the learned Dutch publicist, de Louter, professor of international law at Utrecht, who, while remarking that arbitration, although it is a judicial function (*fonction judiciaire*), is not the same as "jurisdiction" (*jurisdiction*) in the modern sense of an emanation from the sovereign power, sanctioned by forcible execu-

¹ Bonde, Amédée, *Traité élémentaire de droit international public*, Paris, 1926, 357-8.

² Ullmann, Dr. E. von, *Völkerrecht*, Tübingen, 1908, 440 et seq. The original text reads: "Der Mangel einer über den Staaten stehenden richterlichen Autorität und Zwangsgewalt schliesst nicht überhaupt jede *richterliche Entscheidung* von internationalen Streitfällen aus. Eine solche ist vielmehr möglich und zu allen Zeiten in der Gestalt des *Schiedsspruchs* von den Völkern verwertet worden. Der *Schiedsvertrag*, durch den sich die Streitteile gegenseitig verpflichten, den Streitfall vor ein Schiedsgericht (Schiedsrichter, schiedsgerichtliche Kommission) zu bringen und sich dem Schiedsspruch zu unterwerfen, ist der dem Völkerrecht als autonomen Recht unabhängiger Staaten entsprechende Weg, einen Streitfall in friedlicher Weise durch Prozess und Urteil zu rechtlicher Entscheidung zu bringen."

tion, but is a voluntary jurisdiction (*juridiction volontaire*) exercised by judges (*juges*) who are chosen by the litigants themselves, and whose competency (*compétence*) does not extend beyond the limits fixed by the latter, yet declares that it is particularly useful and appropriate to international law, which knows no universal authority; that it constitutes the transition from political methods to methods of law, and is the first step in the long road from anarchy to organization; that it does not give advice, but *decides* and judges, and, sure of its own prestige, feels no anxiety as to the execution of its sentences; that, in its nearer approach to the true jurisdiction (*véritable juridiction*), it opens the prospect of filling the most difficult gap in international law, so that both hemispheres have come to see in it not only the beginning of the edifice of law but also the guaranty of universal peace.¹

Louis Renault, sometime chief adviser in international law to the French Foreign Office, and for many years prior to his lamented death dean of international lawyers, in an article relating to the Fur Seal arbitration, said:

The normal mission of arbitrators, whether they are appointed by governments or by private individuals, is to decide a *difference*, to solve a question of law or fact concerning which the parties are in disagreement. The arbitrators must find, from the documents produced, who is wrong or who is right; they pronounce a veritable judgment.²

This principle was laid down by Renault in the course of his commentary on the power, which the treaty of arbitration conferred on the arbitrators, to formulate regulations for the international protection, outside the three-mile limit, of fur seals resorting to United States territory in Bering Sea, in case the decision on questions of

¹ De Louter, J., *Le droit international public positif*, Oxford, 1920, II. 141, §40. See, also, the original work in Dutch, *Het stellig Volkenrecht*, 2 vols., 's-Gravenhage, 1910, II. 121-2, §40. In the summary here given I have translated the French word *compétence* as "competency," although its ordinary English legal equivalent, just as in the Statute of the Permanent Court of International Justice, is "jurisdiction," which embraces both *jurisdiction*, meaning the power of decision derived from the State, and *compétence*, meaning the scope of the power and the matters embraced in it. The indiscriminate use of the English word "jurisdiction," with its similarity in form to *jurisdiction*, as the equivalent both of *jurisdiction* and of *compétence*, may, especially among those familiar with French but not with English legal terminology, unconsciously if not inevitably tend to produce confusion and erroneous practical consequences; as, for instance, in the case of a "plea to the jurisdiction," where *compétence* rather than *jurisdiction* is involved.

² Une nouvelle mission donnée aux arbitres dans litiges internationaux à propos de l'arbitrage de Behring, *Revue générale de droit international public*, Paris, 1894, 44-51.

law should be adverse to the special right of extraterritorial protection claimed by the United States for itself. On this he commented:

Two persons may have every reason to come to an agreement to form a partnership for example, or to make an exchange; if they do not do so, they merely make use of their natural liberty, and one cannot say that there is litigation between them. In case, however, they should be anxious to come to an understanding and should appoint a third party to define the conditions which would seem to him equitable for an arrangement, it would be wrong to call that third party an arbitrator, since his mission is in no manner that of a judge. . . . I know perfectly that arbitration in industrial affairs is understood in this sense, but it is so used in an inexact way.¹

This comment is altogether just, and I do not intend to question its perfect accuracy when I advert to the fact that functions, quite distinct from the exercise of the power of judicial decision, are habitually imposed on municipal courts, while judicial functions are often committed to distinctively administrative bodies. For nearly a hundred and twenty years aliens were naturalized by the courts in the United States in a purely administrative way, and although the act of admission to citizenship, being performed by a court, was municipally treated as a judgment, it was in reality a mere record of compliance with certain forms, which the executive government, in the conduct of foreign relations, did not treat as conclusive. This condition of things was legislatively corrected twenty years ago not by abolishing the courts, or by substituting for them "judicial" tribunals, or by taking the process from them, but by a change in their procedure. Common examples of essentially administrative functions performed by judicial courts are receiverships and the administration of estates, in the course of which an occasion for the decision of controverted questions of law or of fact may or may not arise. It should be superfluous to explain that the frequent commitment to judicial courts of duties not essentially judicial is due, not to an ignorant misconception either of the character of the courts or of the character of the duties, but to the intelligent desire, no matter how unadvised its indulgence may be, to make use of the sense of justice and equity which the judicial habit of impartial investigation, deliberation and decision is believed to engender. It was under the influence of this view that that singularly accomplished and discriminating expositor of law, Westlake, suggested, in the case of the Anglo-Venezuelan boundary dispute, that, as no line had ever at any time been drawn for the division of the largely unexplored territory then in dispute.

¹ *Revue générale de droit international public*, Paris, 1894, 50.

the arbitrator, in case he should find no basis for a decision on legal grounds, should be authorized to propose a line. This suggestion Westlake justified with the argument that such a proposal, "made as it would be after hearing all that could be said on that branch of the subject, would carry such weight that no party desirous of peace would refuse to accept it."¹

Recurring to the statements of eminent authorities concerning the nature of international arbitration, we may next appropriately quote the expert views of two specialists in the subject, as expressed in an extensive and well-known work to which Renault contributed an introduction. I refer to Messrs. de Lapradelle and Politis, who, in their foreword to their collection of international arbitrations, say:

We discard mediations and diplomatic mixed commissions, in order to confine ourselves to arbitration properly so called, that is to say, to the method of solving international conflicts by the application of the rule of law. A veritable judicial institution between States, arbitration is a juridical instrument of peace and progress, since it gives an effective sanction to the existing law and, by the establishment of a jurisprudence, contributes to the formation of the law of the future; a double advantage, which mediation and diplomatic mixed commissions do not offer, since both are based on the idea of an arrangement and not on that of a judgment.²

Finally, among high authorities, we may cite Fauchille, who, classi-

¹ Letter in *The Times*, London, Jan. 6, 1896, quoted in Balch, "Arbitration" as a Term of International Law, 14.

² "Nous écartons les médiations et les commissions mixtes diplomatiques, pour nous borner à l'arbitrage proprement dit, c'est-à-dire au mode de solution des conflits internationaux par l'application de la règle de droit. Véritable institution judiciaire entre États, l'arbitrage est un instrument juridique de paix et de progrès, puisqu'il donne une sanction effective au droit actuel et que, par l'établissement d'une jurisprudence, il contribue à la formation du droit de l'avenir: double avantage que n'offrent ni la médiation ni la commission mixte diplomatique, car toutes deux sont basées sur l'idée de l'arrangement et non sur celle du jugement." A. de Lapradelle et N. Politis, *Recueil des arbitrages internationaux*, 1798-1855, Paris, 1905, Avant Propos, xx. At this point we may cite Dreyfus, who, writing in 1892, says that the ideal of the partisans of international arbitration is a civilized society subject to one single rule and one single law (*une société civilisée soumise à une seule règle et à un seul droit*); and that they are concerned with the conventions which have in some sort legalized international relations by giving them a legal character (*les conventions qui ont en quelque sorte légalisé ces relations en leur donnant un caractère juridique*). The mediator, he says, conciliates or reconciles the adversaries; the arbitrator gives a judgment (*jugement*) to which they must submit. Mediation is a moral, arbitration a legal, conception. Dreyfus, Ferdinand, *L'Arbitrage international*, Paris, 1892, 113, 248.

According to Foignet, arbitration has two essential characteristics: (1) that it is a *judicial act* (*acte judiciaire*), the arbitrator being a *judge* (*juge*) who renders a sentence; (2) that it is an *obligatory act* (*acte obligatoire*), the states, by agreeing to arbitrate, implicitly binding themselves to execute the sentence, and creating an obligation from which they cannot afterwards withdraw. Foignet, René, *Manuel élémentaire de droit international public*, 3d ed. Paris, 1899, 240.

fying the peaceful ways of settling international disputes as diplomatic and legal (*moyens juridiques*), places in the latter category arbitration, which he defines as a procedure which entrusts to a third party the solution of quarrels between two or more States by the application of law (*par l'application du droit*). Arbitration may, says Fauchille, be voluntary, discretionary and isolated, or obligatory, permanent and institutional (*volontaire, facultatif et isolé, ou obligatoire, permanent et institutionnel*). He says that if the contestants are agreed on the law, and differ only as to the amount of the indemnity to be paid, the proceeding may be only a valuation or appraisal and called *arbitratio* (*il y a expertise, arbitratio*); but that, if the law itself (*le droit lui-même*) is in litigation, if the principle of reparation or indemnity is contested, there is then an arbitration, *arbitrium* (*il y a alors arbitrage, arbitrium*). Following out this conception of the process, he says that arbitration is not suited to the settlement of conflicts of interests of a purely political nature; but that, for disputes of a legal nature (*d'ordre juridique*), arbitration is possible, whether the question be one of law or of fact (*d'un point de droit ou d'un point de fait*).

As a general rule, says Fauchille, arbitrators are charged to determine the dispute according to the general principles of the law of nations (*d'après les principes généraux du droit des gens*). Arbitrators are not mediators. In practice, they sometimes propose to the parties a compromise (*transaction*), and if an amicable arrangement results, they may pronounce their award in accordance with it; but they must decide (*juger*) according to the rights established and proved by the parties. They cannot impose a compromise.¹

The views of Belgian authorities are equally clear and precise. Discussing in 1891 a treaty between France and the Netherlands, by which an arbitrator appointed to determine the boundary line between French Guiana and Dutch Guiana was authorized, in case he should be unable to decide in favor of one of the two rivers claimed by the contracting parties, to adopt an intermediate line, Rolin-Jaequemyns, originator and one of the founders of the Institut de Droit International, while pointing out that two States might, if they

¹ Fauchille, Paul, *Traité de droit international public*, 8th ed. 3 vols., Paris, 1896, I. part iii, 534-7, 543, 544, 548-9.

We should not omit to mention the work of Bry, dean of the Faculty of Law, University of Aix-Marseille, who, in treating of international arbitration as a legal method (*moyen juridique*), says that arbitrators decide as judges (*comme juges*), and that their award is a judgment (*jugement*). Following this definition, he gives in ten pages a remarkably condensed but comprehensive survey, historical and legal, of the origin and development of the practice, including an account of the principal case, thus showing his actual study of the subject. Bry, Georges, *Précis élémentaire de droit international public*, 4th ed. Paris, 1901, 418 et seq.

so desired, confer upon an international arbitrator the power, in case of necessity, to act as a friendly compounder (*amiable compositeur*), went on to say:

There is an International Law. This Law grows either from conventions, or from general principles accepted by civilized Nations. The essential object of resorting to arbitration between States is, not to create that Law, but to cause to be sought and decided by a temporary judge voluntarily chosen—owing to the want of a permanent and obligatory jurisdiction—in what manner International Law is applicable to a given case, which is the cause of a disagreement between the parties. The States which accept arbitration recognize by that very thing (and it is that which gives to that procedure so great a value) that their difference is susceptible of being settled by the rules of International Law, either general or conventional. It is to falsify that idea and to compromise its application, to admit beforehand in the agreement (*compromis*) itself, the eventuality of a solution dictated, not by the Law, but by an arbitrary appreciation of the conveniences of each party.¹

Alphonse Rivier, native of Lausanne, Switzerland, distinguished professor at the University of Brussels and author of a standard work on the law of nations, treats at length of the subject of arbitration, its history and the various types of procedure, ancient and modern. He says that the arbitral agreement may designate the place and time where the arbitral judgment (*jugement arbitral*) shall take place and where the sentence shall be rendered, as well as the procedure which shall be followed and the principles according to which the suit shall be judged—principles of the law of nations, positive or natural, equity, general principles of law—or may yet prescribe the application of a particular legislation, such as the Code Napoleon, or of certain positive rules on which the States in dispute declare themselves to be in accord. It may confer upon or deny to the arbitrator the function of a friendly compounder (*amiable compositeur*), that is to say, it may give or refuse to him the power to accommodate the dispute in the best possible way. But he immediately adds: "It is admitted, in case of doubt, that the arbitrator has not that character. For States, just as individuals, are presumed to renounce their rights as little as possible. The arbitrator is free to suggest a compromise, but it is not his function to impose it, while his award, laying down the law between the parties, is by their own consent binding upon them."²

¹ Balch, Thomas Willing, "Arbitration" as a Term of International Law, 11-12, citing *Revue de droit international*, 1891, 84-5.

² Rivier, Alphonse, *Principes du droit des gens*, Paris, 1896, II. 166-74.

Especially illuminating is the profound and discriminating analysis of the subject made by Baron Descamps, publicist and statesman, member and principal *rapporteur* of the First Peace Conference at The Hague, member of the Permanent Court of Arbitration since its foundation, and member and president of the Advisory Committee of Jurists by whom the original draft of the Statute of the Permanent Court of International Justice was framed. Looking at the substance rather than at the form, he uses the word jurisdiction (*jurisdiction*) simply in the sense of the power to judge, and, contrasting arbitral jurisdiction (*jurisdiction arbitrale*), in which the judges (*juges*) are chosen by the parties to make a final decision, with the magisterial jurisdiction (*jurisdiction magistraturale*), in which the judges are permanent and professional magistrates appointed once for all under conditions independent of the choice of the parties, he observes that, in the arbitral jurisdiction, the standards (*normes*) to be followed in order to render justice (*la justice*) may in turn depend more or less on the choice of the parties, whereas in the magisterial jurisdiction the interpretation and application of the rules of law are subject to standards more stable and universally recognized; and he further observes that, as the arbitral jurisdiction is ordinarily a consensual jurisdiction, wholly voluntary on both sides, it does not permit, as does the magisterial jurisdiction, the unilateral bringing, at least generally, of a law suit. But if, he says, one should proceed from these observations to assume that, while the proper and essential object of the magisterial jurisdiction is to state the law, the object of the arbitral jurisdiction is different, he would commit a real mistake. He then continues:

The proper object of arbitration is not in itself different from the proper object of the magisterial function. The first Peace Conference recognized this when it gave to arbitration in article 15 of the Convention for the Pacific Settlement of International Disputes this definition, which has remained classical: "International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law." (This is repeated in article 37 of the Convention of 1907.) Determining then the nature of litigious questions which properly belong to the arbitral jurisdiction, article 16 expressly specifies questions of a legal order (*d'ordre juridique*).

No doubt it is possible that the arbitrator may, by the will of the parties, be invested with a power of appreciation which permits him to adopt conciliatory solutions, instead of rendering to each party what is strictly due him in law. But such a prerogative, which moreover is not always and necessarily foreign to the functions of the magisterial jurisdiction, constitutes an exceptional and

adventitious attribute, which is not of itself bound to the arbitral function and which does not alter the fact that arbitration remains of its own nature a power to state the law: *jus dicere*.¹

To the same effect are various German authorities. G. F. de Martens, treating of good offices, mediation and arbitration (§176), speaks of a third person being chosen in the character of an arbitral judge (*juge compromissoire*) to pronounce a sentence drawn from the principles of law and binding on the two parties.²

Klüber, after remarking that States by reason of their political independence are not obliged to recognize a common judge, and that a judgment (*jugement*) is admissible only when they agree to it says that, if they submit their difference to an arbitrator and he accepts the appointment, he has a right, after a sufficient discussion and examination of the reasons pro and con, to pronounce an arbitral judgment (*jugement arbitral-laudum*), in conformity with the principles of the law of nations (*principes du droit des gens*).³

Exceptionally interesting are the views of Bluntschli, native of Switzerland, who, after devoting many years to the study and exposition of constitutional law, acquired, after his transplantation to Germany, preeminence as a student and expounder of international law.⁴ Discussing in his most celebrated work the subject of international arbitration, he says:

The arbitral court, consisting of several persons, acts jointly as a body. It hears the parties, and also as circumstances may indicate, witnesses and experts; it examines the pertinent facts and verifies the requisite proofs.

Although it derives its full powers only from the parties, the function of the arbitral court is, nevertheless, a judicial one, and it

¹ Procès-Verbaux des séances du Comité Consultatif de Juristes, 1920, II. 47.

² De Martens, G. F., Précis du droit des gens moderne de l'Europe, ed. by Vergé, 2d. ed. Paris, 1864.

Vergé in a note says that the arbitral decision must serve the parties as a law and a rule (*de loi et de règle*), unless the arbitrators had rendered a judgment (*jugement*) manifestly unjust and contrary to reason.

Leibnitz, Codex Juris Gentium Diplomaticus, Hanover, 1693. References to Vol. I. 305, No. cxxiv, p. 306, §4 of the diploma; also Vol. I. 139-40, §2.

Struvius, Jurisprudentia Heroica, Jena, 1743, chap. i. 6-95. *Observantia indicio et arbitro inter gentes*, §1.

³ Klüber, Droit des gens moderne de l'Europe, Paris, 1861, chap. III, Droit de la Paix, §318—Voie de justice, pp. 405-7. Europäisches Völkerrecht, Stuttgart, Cotta, 1821, Vol. II. chap. 3, 509-11, §318.

⁴ Born at Zürich March 7, 1808, Bluntschli left Switzerland in 1847, and in 1848 became a professor at the University of Munich, where he continued his work as an expositor of constitutional law. In 1861 he accepted a call to Heidelberg in the same subject, but later entered the field of international law, in which he produced a series of well known works. He was one of the founders of the Institut de Droit International at Ghent in 1873, and in the same year represented Germany at the Brussels Conference on the Laws of War.

is accordingly superior to the parties themselves and binding upon them. The procedure is determinable by the Arbitral Court.¹

While thus holding the arbitral office to be distinctively judicial, Bluntschli goes on to say that the arbitral tribunal, in case of doubt, makes equitable proposals to the parties with a view to enable them to reach a direct arrangement; but he says that the arbitrators should consider whether it is good or bad policy to seek to bring about such an arrangement, since they should, in every case, avoid any step which might arouse mistrust and thus put in doubt their impartiality and compromise their position as judges. Compromises, he observes, belong in the sphere of free, voluntary, friendly solutions, while arbitrations have an essentially judicial character.²

It will be observed that on the question of permitting arbitrators in certain contingencies, before deciding the case, to make to the parties proposals for a direct settlement, the view of Bluntschli is shared by Rivier.³ This coincidence suggests two comments. The first is, that, as native Switzers, they both no doubt were influenced by their familiarity with the characteristic and traditional type of Swiss arbitral procedure, which authorized an attempt to conciliate before final adjudication. The second is, that, far from being confused by this familiarity with the combination, they drew the distinction between the two processes with unsurpassed precision and emphasis.

Nippold, discussing in 1914 international arbitration as an institution, very sensibly remarks, as other recent writers in more than one country have done, that the value of arbitration should be estimated from the point of view of international law rather than from that of the question to what extent it may be effective in putting an end to wars. Looking at international arbitration simply from the point of view of the administration of international justice, and holding that arbitration and the administration of justice are in international law practically identical, Nippold declares that the theoretical and

¹ The original text reads: "Das aus mehreren Personen bestehende Schiedsgericht handelt gemeinsam als Ein Körper. Es vernimmt die Parteien und je nach Umständen, auch Zeugen und Sachverständige, prüft die erheblichen Thatsachen und erhebt die erforderlichen Beweise.

"Die Thätigkeit des Schiedsgerichts ist, obwohl es seine Vollmacht nur von den Parteien ableitet, dennoch eine *richterliche* und insofern den Parteien selbst *übergeordnete* beziehungsweise für die Parteien *verpflichtende*. Die *Processleitung* ist bei dem Schiedsgerichte." Das moderne Völkerrecht, 3d ed., Nördlingen, 1878, §491.

The text is the same in earlier editions. A French version is given by Lardy in his translation of Bluntschli's work under the title *Le Droit international codifié*, 2d ed. Paris, 1874.

² Das moderne Völkerrecht, §492.

³ *Supra*, lv.

practical value of arbitration as an institution is to be measured by the importance one attaches to the administration of justice in international law—the law of the commonwealth of nations, just as municipal law is the law of a State. The value of the administration of justice in international law must, he says, naturally increase in proportion as disputes between States assume the character of lawsuits, susceptible of solution by judicial process. That this becomes increasingly possible cannot, he thinks, be denied reasonably; and he accordingly believes that States will more and more frequently resort to the course of the law.¹

Lammasch, the eminent Austrian authority, maintains that as it is the function of a court to administer justice according to law, so it is the function of the arbitral tribunal to administer justice in the same way, and that it does not fall within the scope of its duties to bring about an agreement between the litigants through mediation. He emphasizes the importance of constantly keeping in mind the distinction between arbitration and mediation, since a confusion of the functions of the two processes would prove to be disadvantageous to both institutions.²

Count Kamarowsky, the Russian publicist, in 1887, in a special work advocating the establishment of an international tribunal, divided the methods of solving international disputes into three classes: the coercive, the diplomatic and the legal, the third method being arbitration. He observes that in arbitration one saw the most ancient form of jurisprudence.³

Novicow, in a work on the Federation of Europe, speaks of arbitration as a method which has on numerous occasions been employed by governments for the settlement of differences on legal principles.⁴

Fiore, Italian Senator, distinguished professor and publicist, says that arbitration between States has the same legal character as arbitration between individuals, save the differences which in the application of the process result from the diversity of things and the particular condition of the subjects involved. It is, he says, a mandate (*mandat*) conferred by common accord, according to general rules of law on one or more persons for the purpose of resolving as judges a given difficulty which exists between two or more States, in order that it may be decided according to the rights (*les droits*) which

¹ Nippold, Das Problem der obligatorischen Schiedsgerichtbarkeit. 8. Jahrbuch des öffentlichen Rechts der Gegenwart, 1914, 1 et seq.

² Lammasch, Die Rechtskraft internationaler Rechtssprüche. Publications de l'Institut Nobel Norvègien, tome ii, fasc. 2, Kristiania, 1913.

³ Kamarowsky, Le tribunal international, tr. by J. Lacointa, Paris, 1887.

⁴ Novicow, La fédération de l'Europe, Paris, 1901, 735.

belong to each of the parties to the cause. It is clear, he observes, that the essential difference between arbitration and mediation results from the legal character of arbitration. A mediator is not a judge and the advice he gives is not a binding decision but only a weighty counsel, an impartial opinion, having great moral authority, but not binding upon the parties, who remain perfectly free to accept or to reject the mediatorial proposal according to what they may think of it as the basis of a friendly compromise. "Ideally," he says, "arbitration has the same character as a judgment (*jugement*), and the decision of the arbitrators is a sentence binding upon the parties who have provoked it. It suffices for this that the parties have accepted arbitration in the forms established by law, and that the judgment (*jugement*) of the arbitrators has been pronounced conformably to customary legal prescriptions (*prescriptions légales en usage*)."¹

Fiore dealt with arbitration yet again in his proposed Code of International Law, in which he adopts the declaration made in the Hague Convention for the Peaceful Settlement of International Disputes, that arbitration is the most equitable and effective means of settling questions of a legal nature, and he expressly declares that in order to establish the reign of law in the international society it is the legal duty of all its members "to submit all disputes of a legal nature to arbitration." He further declares that arbitration must be considered "as an indispensable institution" for the consolidation of the empire of law and the sentiment of justice and for the legal organization of the international society.²

Carnazza-Amari, a fellow-countryman of Fiore's and sharing his views, declares that arbitration is without contradiction the justest means of resolving difficulties between States, because the international dispute instead of being put to the lottery of arms is studied, discussed and judged conformably to the rules of law (*étudié, discuté et jugé conformément aux règles du droit*).³

Alessandro Corsi, treating of international arbitration in 1893, expounds the thesis that the Society of States, considered as a single political and legal organization which has been developing through centuries, must gradually develop vital organs not essentially different from those of the single States that compose it, and that among

¹ Fiore, Pasquale, *Nouveau droit international public*, 2e ed. Paris, 1885, II. 627, §1206.

² Fiore, Pasquale, *Le droit international codifié*, tr. de l'Italien par Ch. Antoine, Paris, 1911, 593-4, §§1294-5. English translation by Edwin M. Borchard, New York, 1918.

³ Carnazza-Amari, *Traité de droit international public*, tr. into French from the Italian by Montanari-Revest, Paris, 1882, II. 559, §5.

those is the judicial function, represented in the international sphere by the arbitrator. While deprecating the mingling of diplomatic with judicial function, he says that if, either voluntarily or under the arbitral agreement, the arbitrator exceptionally assumes the office of mediator, this does not cause him to lose the predominant character of judge, any more than does the exercise, under municipal law, of the conciliatory power sometimes vested in justices of the peace and collegiate judges, take from them the character of magistrates empowered to interpret and apply the law.¹

Felter-Moreno, speaking from Spain, declares that the arbitrator is a judge (*juez*), and that his decision, when it is rendered conformably to law, has the character of a judgment (*sentencia*), binding on the parties who have agreed to submit to it; that the arbitrator acts in the spirit of equity or of strict law, the mediator always in that of equity.²

So, also, according to the Marquis of Olivart, international arbitration exists when two or more nations freely commit to a tribunal, chosen and accepted by them, the solution, according to law (*con arreglo á derecho*), of a juridical question pending between them.³

Passing from the continent of Europe to England, we may first cite Sheldon Amos, who, in a special work on political and legal remedies in the international sphere, states that the "essential elements" of arbitration are (1) an agreement between States to refer a dispute between them to the decision of "a tribunal believed to be impartial," and "to abide by its judgment," and (2) the consent of the designated persons "to conduct the inquiry and to deliver judgment." Consequently there are, he says, "certain conditions which must be satisfied in order to render arbitration even so much as possible." The first of these is that "the matter in dispute must in itself admit of being formulated in such a way as to be made a matter of judicial decision, as distinguished from an equitable arrangement or adjustment of political claims," although the terms of reference may be "large and indefinite," and may confer upon the arbitrators "considerable powers . . . of adjusting claims, even of an indeterminate kind, and making compensatory settlements of a variety of sorts." "This condition," he concludes, "points to the obvious suitability of arbitration to all cases in which the dispute relates to a matter of

¹ *Arbitrati internazionali*, Pisa, 1893, III. 10-11, 18-19. International arbitration is discussed by Professor Ludovico Casanova in *Del diritto internazionale*, 3d ed. based on the 2d, with notes by Signor Emilio Brusa, Florence, 1876, I. clxxi-cclxiv, §10.

² Felter-Moreno, *Manual de derecho internacional*, Madrid, II. 14-15.

³ Olivart, Marqués de, *Tratado de derecho internacional público*, cuarta edición, Madrid, 1903, III. 11.

unsettled law, or to controverted matters of fact, or to the correct interpretation to be placed on a treaty or other legal document, or to the fixing of a boundary line, or to the amount and kind of compensation due for an admitted wrong, or to monetary claims on the part of a State against another State.”¹

Leoni Levi, observing that States may, in order to avoid a resort to war, submit their dispute to arbitration, says: “The arbitrators so selected form a voluntary court of justice, and they have the right to adopt their own rules of procedure.”²

Any survey of English opinions on a question of international law would be glaringly incomplete, which should fail to examine the great work of Hall. This work, first published in 1880, is now in its eighth edition, but, for present purposes, I use chiefly the fourth, published in 1895, which, although it actually appeared after the learned author’s death, contains the text of his third edition, down to page 514, as revised by himself.

Speaking of international arbitration, Hall says:

Disputes can be amicably settled either by direct agreement between the parties, by agreement under the mediation of another power, or by reference to arbitration. The last of these modes is the only one of which anything need be said, the other two being obviously outside law. . . . The arbitrating person or body forms a true tribunal, authorized to render a decision obligatory upon the parties with reference to the issues placed before it. It settles its own procedure, when none has been prescribed by the preliminary treaty; and when composed of several persons it determines by a majority of voices.³

Hall further says that, when the rules or principles to be applied are not laid down in the instrument of submission, “the arbitrators proceed according to the rules of civil law, unless, as is sometimes the case, they agree to be bound by special rules formed by themselves,”

¹ Political and Legal Remedies for War, by Sheldon Amos, New York, 1880, 118-19. See, also, Creasy, *First Platform of International Law*, London, 1876, 392, 394.

² International Law, by Leoni Levi, F. S. A., F. S. S., of Lincoln’s Inn, Barrister-at-Law, New York, 1888, 268, 270, §§404, 410.

Baty, referring to the variant senses in which the word “arbitrator” is used in law, public and private, and the criticisms made of the workings of the system, remarks: “It is not the informality of the process; it is not the repudiation of legal rules; it is not the quadrisyllabic name, that makes the arbitrator. It is the free choice of the disputants.” International Law, by T. Baty, D. C. L., LL.D., London, 1909, 3.

³ Hall, William Edward, *A Treatise on International Law*, 4th ed., Oxford, 1895, 378-9, §§118, 119.

The 8th edition, by A. Pearce Higgins, after the phrase “by reference to arbitration,” reads: “[or submission to the Permanent Court of International Justice]. The last [two] of these modes,” etc., as in Hall’s original text, brackets having been used by the editor to denote his own additions.

and he maintains that the arbitral decision "must for practical purposes be regarded as unimpeachable," except "when the tribunal has clearly exceeded the powers given to it by the instrument of submission, when it is guilty of an open denial of justice, when its award is proved to have been obtained by fraud or corruption, and when the terms of the award are equivocal."

Referring to eighteen arbitral decisions delivered during the nineteenth century, prior to 1895, on what he called "relatively unimportant matters," Hall observed that "very few are [were] open to serious criticism," and that "more than one" had "settled disputes out of which a good deal of ill feeling might have arisen"; but he immediately added that it was "unfortunate that both the proceedings and the issue in the most important case of arbitration that has yet occurred were little calculated to enlarge the area within which confidence in the results of arbitration can be felt." To this exceptional animadversion, which related to the arbitration of the Alabama claims at Geneva,¹ Hall appended a note in which, after referring to four then recent cases, one of which, he observed, was "unimportant," while the other three were "concerned only with matters of fact," he commented thus:

They are therefore cases which are eminently fitted to be settled by arbitration if there is good faith on both sides, and the arbitrator can be trusted to be equitable. In these instances there is no reason to doubt that arbitration will be successful; but the rejection by the United States in 1831 of the award given against it in the matter of the British-American boundary shows how little calculated that method is to put an end to disputes of any magnitude unless honesty of intention exists on every hand. It is hardly necessary to mention the recent case of the Behring Sea fur seal fisheries, as an instance in which recourse has been had to arbitration with conspicuous success, and in which the arbitral method of settling international differences has acquired new authority from the dignity and ability that marked the conduct of the proceedings.

In his censure of the Alabama arbitration, in which the United States won and Great Britain lost, the learned author represented a style of criticism then locally current, the exponents of which seem to have overlooked the circumstance that, as regards the claims growing out of the building, escape and depredations of the typical ship, the *Alabama* herself, the British arbitrator, Sir Alexander Cockburn, who never professed to be partial to the United States, joined with his colleagues in finding the British Government liable. In the

¹ While there could be no doubt as to what case was meant, the editors of later editions have expressly specified this arbitration. See 8th ed. 421.

fur seal arbitration, which Hall extols, Great Britain won and the United States lost. It is not improper to remark that I have myself heretofore ventured the opinion, which I have found no reason to modify, that in both arbitrations the award was in accordance with law and essentially just, each government winning when it deserved to win, and losing when it deserved to lose.¹

So great is my respect for the general quality of Hall's work, for his learning and independence, that I have always been inclined to treat his propensity to have an occasional fling at the United States not with resentment, but rather as if it were an amiable weakness; and in the present instance I have only to say that his explicit imputation to that Government of a dishonest intention in the rejection of the "award" of 1831 calls for nothing more than a simple statement of the facts, especially as he has himself declared that an award is impeachable "when the tribunal has clearly exceeded the powers given to it by the instrument of submission."² In reality the incident of 1831 constitutes among publicists the standing illustration of the justified application of that rule. The so-called award "was not," says Renault, "truly a judgment; the arbitrator had not fulfilled his mission, which was to judge, and he had done what was not asked of him; in truth he had assumed the rôle of a spontaneous mediator, proposing a friendly solution of the difference."³ Of the

¹ Moore, *History and Digest of International Arbitrations*, Washington, 1898, I. 670 (Alabama arbitration); I. 957-8 (fur seal arbitration). Lord Birkenhead, referring to Hall's comment on the Alabama arbitration, says: "Any objections which may be raised against the Alabama award cannot be laid at the door of the principle of arbitration; the fault there rested not with the arbitration, but with the Treaty of Washington, which laid down the law by which the arbitrators were bound." *International Law*, by the Right Hon. the Earl of Birkenhead [F. E. Smith], 6th ed. London, 1927, 152. The distinction thus made is correct. The true question is whether the standard of neutral duty embodied in the "three rules" of the Treaty of Washington is in conformity with the prescriptions of international law as it existed at the time when the claims arose. The affirmative is maintained in my *History and Digest of International Arbitrations*, I. 670 et seq. The three rules naturally were from the outset discredited in England by the declaration which the British plenipotentiaries, by express command of their government, inserted in the treaty, to the effect that that government, while agreeing that the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in the rules, could not assent to them as a statement of principles of international law which were in force at the time when the claims arose. By such a declaration an adverse award was of necessity locally discredited in advance.

² *Supra*, lxiii. Lord Birkenhead cites only Hall as authority for the following statement: "Losing parties have, on the whole, honorably observed their obligations in the numerous arbitrations which have taken place during the past century; the action of the United States in 1831 providing the only notable instance of a refusal to accept an award." *International Law*, 6th ed. 1927, 152. At the same time, citing Hall again, he says "a decision may be disregarded" when the arbitrator exceeds his powers.

³ *Revue générale de droit international public*, 1894, 44-51, cited by Balch, "Arbitration" as a Term of International Law, 13.

same opinion is Hall's eminent compatriot, Westlake, who says that the arbitrator, the King of the Netherlands, "did not adjudicate on the respective lines proposed by the parties, but proposed an intermediate one as a compromise, which the United States were not bound to accept and did not accept."¹ So, with admirable precision, speaks Calvo, who states that the arbitrator, "instead of laying down the true line, left this in suspense and confined himself to suggesting (*suggérer*) a basis for an entirely new and hypothetical arrangement, which the parties agreed in disregarding."²

But the matter does not rest upon opinion. The facts are so plain and incontrovertible that there can be no difference of opinion among those who have examined them. By article 5 of the treaty of peace between Great Britain and the United States signed at Ghent, December 24, 1814, it was stipulated that commissioners should be appointed to determine the boundary in question, and that, in case they should be unable to agree, the points of difference should be submitted to the "decision" of some friendly sovereign or State, and that his "decision" should be considered as "final and conclusive." This precise engagement is recited in the preamble of the convention of September 29, 1827, by which the two Governments, the commissioners having failed to agree, engaged to refer the points of difference to a friendly sovereign or State, who should be "invited to investigate, and make a decision upon, such points of difference." This invitation was extended to the King of the Netherlands, and was accepted by him; and he designated a committee to make the investigation. A copy of the convention was of course communicated to him, and is recited in the document in which the result of the submission is recorded. The convention expressly provided that in case the arbiter, in order to attain a "just and sound decision," should desire "further elucidation or evidence" in regard to any point contained in the statements submitted to him, the parties would respond to his request for it; that, in case he should find that the topographical evidence laid before him was "insufficient for the purposes of a sound and just decision," they would order additional surveys of "any portions of the disputed boundary line or territory as he may think fit," and that his "decision," when given, should "be taken as final and conclusive," and should "be carried, without

¹ Letter in *The Times*, Jan. 6, 1896, cited by Balch, id. 14.

² *Le droit international*, 4th ed. 1888, III. 485-6, §1774. While it is true that the British Government offered to accept the arbitrator's suggestion, and was undoubtedly well advised in so doing, it is equally true, as Calvo states, that the two governments concurred in recognizing the fact that no award had been made; and they later settled the line by direct agreement in 1842.

reserve, into immediate effect." The arbitrator's committee, however, without invoking the provision for further elucidations or evidence and additional surveys, advised him that the points which the parties had by common accord submitted to him were not susceptible of decision, with the result that the arbitrator on January 10, 1831, handed down an "award" which, instead of assuming to decide the points in dispute, purported only to express an "opinion" upon them. This "opinion" was to the effect not only that the arguments and proofs were not sufficiently preponderating (*prépondérans*) to create a preference (*déterminer la préférence*) in favor of either party, but also that the nature of the difference and the vagueness of the terms (*stipulations vagues*) of the boundary treaty did not permit the arbitrator to give judgment (*adjuger*) in favor of the one side "without violating the principles of law and equity towards the other"; and, the arbitral function having thus been expressly abdicated and renounced as impossible of performance, the opinion was expressed that it would be suitable (*il conviendra*) for the parties to adopt certain suggestive lines, subject to contingencies partly dependent on the results of fresh surveys, all this being left, as indeed it must have been, to the voluntary action and mutual agreement of the parties themselves.¹

Sir Henry Maine, speaking in 1887 of the supposition that "nations fight because they cannot go to law," said that, although there was no international tribunal which could "entertain as of right the controversies of nations," there was "a substitute for it in international arbitration"; but that, before arbitration was accepted as a "universal remedy for war, one or two of its defects ought to be specially noticed." He then proceeded to a long detail of defects, the first of which was the lack of "irresistible coercive power." There also were, he said, some "practical defects." Just as insurance companies and railway companies were unpopular in English courts so there were States which might in the same sense be "unpopular litigants" before bodies of international arbitrators. Indeed he

¹ I have been thus explicit in the statement of the facts in this case, not because they are obscure, but because I desire as far as possible to dissipate misunderstandings. For instance, in the *Encyclopædia Britannica*, 11th edition, 1910, II, 327, under "Arbitration, International," while this case is given as an example of the application of the principle that an award "may be set aside, i.e., ignored, if the tribunal . . . has exceeded its jurisdiction," it is erroneously stated that, the representatives of the arbitrator being unable to draw the line by reason of the imperfection of the maps then in existence, "he therefore directed a further survey," and that, this direction being "beyond the terms of the reference," "the award, when made, was repudiated by the United States as void for excess." As has been seen, the convention expressly authorized the arbitrator to require further surveys for the purpose of reaching a *decision*, but, instead of doing so, he held that a decision was impossible.

should not, he admitted, be "surprised" to find that, in the opinion of English diplomatists and statesmen in charge of foreign affairs, their own country was "not a popular litigant" before such bodies; the truth being, as he declared, that Great Britain was thought to be "very wealthy" and thus "able to bear the burden of a money award against it better than any other community"; to be "comparatively careless of its foreign policy, and not to show much sensitiveness under a judicial rebuff"; and, lastly, to have "so contrived its international relations as to escape from its fair share of the anxieties and sufferings which fall upon other States through war, apprehension of war, and preparation for war."¹ Moreover, it was not, he thought, to be denied that the composition of international arbitral bodies was "not altogether satisfactory." An indispensable element in their composition was one or more of the old class of lawyers called "jurists," such as existed as lately as the eighteenth century, "who had made a special study of international law, and whose collective opinion had serious influence on the development of the system." This class had, he intimated, so far disappeared that nobody could then quite say what a "jurist" was, and he did not hesitate to declare that, "in point of fact, most famous foreign writers on international law" were "salaried functionaries of foreign chanceries," who, as an examination of "very modern treatises" would show, were necessarily "strongly affected" by their "official connection" and the "interest" which they supposed their respective governments to have "in the establishment, maintenance, or development of particular features of the international system." Who these biased "foreign" writers were he did not disclose, nor did he specify the treatises; but he affirmed that the drawback he had just mentioned on the usefulness of international quasi-courts of arbitration was closely connected with the "general defect" that they did not exercise continuous jurisdiction. They were formed for the single occasion; they of necessity attended simply to the question in immediate dispute, and it was uncertain what weight should be attached to their awards as precedents. For these infirmities Sir Henry suggested that a remedy might be found in "a single permanent court, or board, or assemblage of arbitrators, who should act as referees in any questions which any community or communi-

¹ Probably Sir Henry was acquainted with the speech made in Parliament by Lord Palmerston on June 12, 1849, on a motion of Cobden's, in which his lordship commented on the difficulty in the case of England of obtaining impartial arbitrators, because of the jealous feeling excited by her political and commercial circumstances, her maritime interests, and her colonial possessions. Ashley, *Memoirs of Lord Palmerston*, I. 58. This is cited in Creasy, *First Principles of International Law*, 698.

ties should choose to submit to them." Where the surviving "jurists" were to be found for the composition of such a body, he did not indicate; but he thought that such a tribunal would at any rate be freer from prejudice than the "occasional adjudicators," and could be better trusted to adjust its awards to the entire body of international principles, distinctions, and rules. Still, he declared, it would not be a true court of justice, since, sharing the weakness of all international law—the lack of a sanction and of the power to command the assistance of force—it could not punish the breach of its rules or the violation of an international duty.

It is remarkable that, through all Sir Henry's scrupulous detail of the defects of international arbitration, the judicial nature of the process is consistently assumed and never doubted. On the other hand, it is obvious that the defects on which he expatiated are intimately related to his conception of the award of the Geneva tribunal in the *Alabama* case, with which he immediately proceeds to exemplify them. While conceding that this was "perhaps the greatest of all arbitrations," and that, by putting an end to a number of bitterly disputed questions, it conferred great benefit for the moment on Great Britain and the United States, he yet expressed apprehension that "looked at as a precedent likely to exercise serious influence on the whole law of nations, . . . it was dangerous, as well as reactionary and retrogressive." In saying this he particularly referred to its abridgement, as he conceived it, of the "rights of neutrals," and its invasion of "the principle that neutral States are merely States which have kept out of a calamity which has fallen on others, and which merely desire to follow their own business in their own way";—a sentiment once highly esteemed and very prevalent and perhaps still possessing some vitality, but so little encouraged or commended during the past fifteen years that Sir Henry might, were he alive, be the first to admit not only that the tendency of national attitudes to be influenced by varying impressions of national interest may conceivably be universal, but also that arbitration may share with all other judicial proceedings the proverbial misfortune that the loser always thinks badly of it, while the winning party accepts victory merely as his due.¹

¹ Maine, *International Law*, 211–18. At p. 217, Sir Henry says that, in the *Alabama* arbitration, Great Britain not only "was penally dealt with for a number of acts and omissions, each in itself innocent," but that "she had a standard of due diligence applied to her neglects which was extremely severe." The treaty did not define "due diligence," but merely prescribed it; the arbitrators interpreted and applied it. As has been pointed out, *supra*, lxiii, the award of the tribunal in the case of the principal ship, the *Alabama*, was unanimous. The principle was not new. It was applied in favor of Great Britain and against the

Oppenheim speaks of arbitration as "the name for the determination of differences between States through the verdict of one or more umpires chosen by the parties."¹ He also states that the treaty of arbitration "must stipulate the principles according to which the arbitrators have to give their verdict"; but this statement was later corrected by substituting "should" for "must."² The principles thus stipulated may, he says, be "the general rules of international law," or "the rules of any municipal law chosen by the conflicting States," or "rules of natural equity," or rules specially stipulated for the special case. The arbitrators may, he declares, be empowered to "compromise the conflicting claims of the parties without resorting to special rules of law"; but he adds that, "in default of any express provision, it must be presumed that the verdict is to be given according to principles of international law, or if there are none applicable, according to rules of equity."³ As to the possibilities of the process, he expresses the opinion that, provided the disputants consent, "every possible difference might be settled through arbitration, whether the verdict is based on the rules of international law or rules of natural equity, or the opposing claims are compromised"; but he points out that, to the question "what kind of State differences *ought* always to be settled in this manner," article 16 of the Hague Convention has made answer by recognizing arbitration as the most efficacious and the most equitable means of determining differences of a judicial character; and he also adverts to the fact that the treaties of 1903 and after, saving questions affecting independence, vital interests, honor, or the interests of third parties, have made exceptions to that answer. But he speaks of the creation of the Permanent Court of Arbitration as "a step by which a new epoch of the development of international law was inaugurated."⁴

United States, under article 7 of the Jay Treaty of 1794. Moore, *History and Digest of International Arbitrations*, I. 310-16, 343.

¹ *International Law*, 1st ed. 1905, II. 15.

² *Id.* 3d ed. 1921, II. 19.

³ This clause was added in the 3d ed. II. 19.

⁴ Lawrence observes that the value of arbitration "resides in its judicial or quasi-judicial character. It signifies the reference of the dispute to an individual, or small group of individuals, to whom the parties state their respective cases, and whose decision they are in honor bound to obey." Lawrence, T. J., *The Principles of International Law*, 7th ed. by Percy H. Winfield, New York, 1923, 566, §221.

Says Coleman Phillipson: "The progress has been from mediation and diplomacy to a greater or lesser combination of arbitration and diplomacy, and then to pure, i.e. judicial arbitration. . . . The question of arbitration is perhaps of greater consequence in the world's affairs from the standpoint of the jurist than from that of the peace idealist. With the perfection of arbitral procedure the political or diplomatic character will disappear, and the purely judicial spirit will prevail." *Two Studies in International Law*, London, 1908, 23.

Westlake, in his admirable treatise, after defining arbitration as "a proceeding in which a difference is referred, by agreement of the parties, to the decision of one or more arbitrators," says:

The essential point is that the arbitrators are required to decide the difference—that is, to pronounce sentence on the question of right. To propose a compromise, or to recommend what they think best to be done, in the sense in which best is distinguished from most just, is not within their province, but is the province of a mediator.¹

Lord Birkenhead has in some of the editions of his work discussed international arbitration, and particularly the attempts to systematize its application, more fully than is generally done in general treatises on international law; but it will for our present purposes suffice to quote his last edition, in which tribunals and cases are surveyed in less detail.² While stating that in modern times many important cases have been decided relating not only to commercial matters, but also to the delimitation of boundaries, territorial waters, the rights and obligations of neutrality, the seizure of vessels and cargoes, the nature of contraband goods, the effects of a declaration of war, and questions relating to slavery, he observes that "any arbitration has its limitations when the court has no power to enforce its award." He says, however, that "behind the award there is always the sanctity (for what it may be worth) of an international treaty," and that "international public opinion will always have a restraining effect, and can seldom be entirely disregarded." He expresses the opinion that the "chief practical achievement" of the Hague conferences of 1899 and 1907 was "the establishment of a permanent machinery for dealing with international disputes," and that "such an institution was the logical outcome of a tendency which had been gathering force for over a century to resort to arbitration as an alternative to war"; but he thinks that, although the results of the conferences "marked a great advance," they "still left much to be desired." His precise meaning on this point he states thus:

The only provision for the settlement of disputes was by way of arbitration, which always suffers from one inherent defect when viewed from the standpoint of the development of international law: it tends to be a decision on the merits rather than on the law, a decision which is well adapted to the demands of a particular and momentary situation rather than one which is based on reasons which possess a general value apart from the particular case. Clearly if systematized methods for the pacific settlement of dis-

¹ International Law, 2d ed. 1910, I. 354.

² International Law, by the Right Hon. the Earl of Birkenhead [F. E. Smith], 6th ed., London, 1927, 172.

putes were to contribute to the advancement of international law from being a branch of law so imperfect, so incomplete, so difficult to transform, there was need for a tribunal that would be both permanent and judicial. The establishment of a permanent world organization—the League of Nations—and the enhanced credit acquired in recent years by arbitration in general and, more particularly, international justice, made possible the creation of the Permanent Court of International Justice.¹

Sir Thomas Barclay, speaking of “the nature, progress and scope of arbitration,” says that he is not so much concerned with the history of the subject, as “with its organization as a judicial system.”²

Sir Thomas is appropriately cited in a recent discussion by Mr. R. Y. Hedges of the nature of arbitration, based not on presumptions or conjectures, but on a personal and detailed examination of the records of cases and the awards. Summing up his conclusions, Mr. Hedges submits “that plans for the further development of international arbitration should proceed on the assumption that in the modern application at least it rests on a juridical basis”; and he adds:

This is really of fundamental importance, and a failure to recognize it has led to a great deal of confusion, and among other things has caused misunderstandings as to the nature and distinction between arbitration and judicial settlement. That distinction may in fact be reduced to a purely procedural distinction, and it depends on the fact that in arbitration the arbitrators are appointed *ad hoc* by the parties, whereas in pure judicial settlement there must be a permanent court. In both the process is an essentially legal one.³

The latest expression of English opinion is that by Brierly, who, in a compact volume worthy of the best traditions of the Chichele Chair of International Law, after remarking, as Hedges had done, that “confusion” has been created “by the unfortunate practice of using the word ‘arbitration’ as though it meant nothing more than the peaceful settlement of a dispute,” arbitration actually being “a definite legal process,” says that the peaceful settlement of a dispute between two individuals or two States may be approached either by inducing them to accept terms of settlement dictated by a third party, or by persuading them to come together and agree on terms of settlement for themselves, and that, in the international field, the former method takes the form “either of arbitration, or of judicial

¹ International Law, by the Right Hon. the Earl of Birkenhead [F. E. Smith], 6th ed., London, 1927, 151–2, 172–3.

² New Methods of Adjusting International Disputes and the Future, London, 1917, chap. V.

³ The Juridical Basis of Arbitration, by R. Y. Hedges, Faulkner Fellow and Assistant Law Lecturer in the University of Manchester, The British Year Book of International Law, 1926, 119.

settlement"; the latter, "either of good offices, or mediation, or conciliation." Arbitration and judicial settlement are, however, he affirms "closely allied; indeed," he declares, "the former is only a species of the latter, for an arbitrator is a judge, although he differs from the judge of a standing court of justice in being chosen by the parties, and in the fact that his judicial functions end when he has decided the particular case for which he was appointed." The learned author then goes on to say:

The distinction is important, because a standing court is able to build up a judicial tradition and so to develop the law from case to case. . . . But so far as the parties are concerned, they are as likely to get a satisfactory decision from a court of arbitration as from a court of justice, and there may even be special circumstances which make the former a preferable tribunal. . . . Arbitrators and judges are alike bound to decide according to rules of law; neither possess a discretionary power to disregard the law and to decide according to their own ideas of what is fair and just. No doubt the parties, if they choose, may confer such a power on an arbitrator, or they may agree on special rules which he is to apply to the exclusion of the ordinary rules of law, but they may also confer a special power of this kind on a judge, as is expressly provided in Article 38 of the Statute of the Permanent Court of Justice."¹

Passing from England to the United States, it is interesting to note the fact that in the first arbitration to which the United States was a party—the arbitration of which the two present volumes give the history and the record—the judicial character of the process was avowed on both sides: Mr. Sullivan, the American agent, declaring that, although negotiation might have accommodated the settlement of the controversy more nearly to the "interest of the individuals particularly concerned," yet the treaty had "placed it on a judicial investigation"; while Mr. Chipman, the British agent, expressed the wish "only that the testimony on both sides may be carefully read and compared, being satisfied that the true and fair result of the whole will be easily discovered by the Judges in the cause." These declarations of the agents were most strikingly confirmed by the action of the two Governments themselves in mutually choosing as

¹ The Law of Nations: An Introduction to the International Law of Peace, by J. L. Brierly, Oxford: At the Clarendon Press, 1928, 176 et seq. The author goes on to observe: "It should be added, however, that the purely judicial character of an arbitrator's function is not always recognized, and the Continental view of it seems to be less strict than our own; at any rate, some Continental arbitrators have expressly claimed a discretionary power to give what they regard as a just, rather than a strictly legal, decision. In practice also, courts of arbitration have not always given the reasons on which their decision was based, so that it is impossible to be sure what view they may have taken of their function."

the third arbitrator a citizen of the United States holding a judicial office in the State of New York.

Mr. Webster, as Secretary of State, referring in 1842 to the United States and Mexican Mixed Claims Commission under the treaty of 1839, stated that the commission had always been considered by the United States as "essentially a judicial tribunal, with independent attributes and powers in regard to its peculiar functions," and therefore as possessing, like "all other judicial bodies," the "right and duty . . . to determine upon the nature and extent of their own jurisdiction, as well as to consider and decide upon the merits of the claims which might be laid before it."¹

In Kent, arbitration is differentiated from mediation by the test that the former gives a "judgment"; the latter, "only counsel and advice."²

Halleck, while remarking that the mediator "acts the part of a conciliator rather than a judge," says:

Arbitration is where the decision of a dispute is left to arbitrators chosen by common agreement. . . . It is usual to specify in the agreement to arbitrate, the exact questions which are to be decided by the arbitrators, and if they exceed these precise bounds and pretend to decide upon other points than those submitted to them, their decision is in no respects binding. Thus, the award of the King of the Netherlands, on reference by treaty, in 1827, of the question of the North-Eastern boundary of the United States, not being a decision of the question submitted to him, but a proposal for a compromise, was not regarded as binding either upon the United States or Great Britain, and was rejected by both, the dispute being afterwards amicably settled by the parties themselves.³

David Dudley Field proposed that, where two nations failed to agree, they should each appoint five members of a Joint High Commission, who should discuss the differences and endeavor to effect a reconciliation; but that, in case this should fail, the disputing nations should appoint a High Tribunal of Arbitration, which was to "hear the parties, and decide between them," the decision to be final and conclusive.⁴

Hershey, while observing that mediation, since the mediator acts as a common friend "rather than as a judge," is "especially adapted to the settlement of *political* differences," says that "international

¹ Sen. Ex. Doc. 320, 27 Cong. 2 sess. 185.

² *International Law*, edited by Abdy, 2d ed. London, 1878, 153.

³ Halleck, *International Law*, fourth ed., by Baker, assisted by M. N. Drucker, London, 1908, I. chap. xiv, 498-500.

⁴ *Outlines of an International Code*, second ed., New York, 1876, 369, 370, §§534, 535.

arbitration is a quasi-judicial mode of settlement of international disputes in which, by agreement of the parties concerned, one or more arbiters are selected for the decision of the controversy."¹

"Recourse to arbitration," says Hyde, "implies that the issue is regarded as justiciable, that is, one capable of reasonable adjustment by reference to accepted principles of international law, that the arbitrators are acquainted with those principles and will apply them, and that the parties to the controversy will respect the award."²

Likewise another and contemporaneous writer, speaking with a precision and thoughtful discrimination much to be commended, says:

Arbitration may be formally defined as the settlement of international disputes by judges chosen by the parties. . . . Arbitration is judicial settlement. That is to say, it is settlement by a person or group of persons acting in a judicial capacity, attempting to settle the dispute by reference, not to the claims of one or the other of the parties . . . but by reference to some standard common to both parties and external to the particular dispute. . . . Whether the arbitrator decides the case by equity or by law, he is acting in judicial capacity, and where legal foundations are not used in the process it is because they do not exist. The deficiencies of the system of international law, however, should be kept distinct from the supposed deficiencies of arbitral procedure.³

¹ Hershey, Amos S., *The Essentials of International Public Law*, New York, 1912, 323, 327.

² Hyde, Charles Cheney, *International Law*, 1922, II. 112-13.

³ Potter, Pitman B., *An Introduction to the Study of International Organization*, New York, 1922, 212, 213.

In the "court of arbitration . . . disputes are voluntarily submitted to a judge or judges chosen by the parties concerned." Hughan, Jessie Wallace, *A Study of International Government*, New York, 1923, 61.

A position not wholly coincident with the general tenor of authority appears to be taken in *La Conciliation Internationale*, Paris, 1925, by Professor Philip Marshall Brown, who, while adverting to the fact that the Committee of Jurists, who made the original draft of the Statute of the Permanent Court of International Justice, accepted, as the basis of their discussions, M. de Lapradelle's interpretation of the word "arbitration" in the Covenant of the League of Nations, as meaning "international judicial settlement," as well as to the fact that the Secretariat of the League had afterwards seemed to contrast arbitration with "judicial settlement," himself expresses the view that arbitration properly so-called occupies a middle ground between judicial procedure, in the strict sense of the word, and mediation—investigation and conciliatory procedure being comprised in the latter. He further remarks, however, that, just as the arbitrator must often be guided by a certain body of rules of law agreed upon by the parties in dispute, so the judge must, in applying the law, often be guided by equity (pp. 45-7). This remark is undoubtedly true, and it serves to show how attempted distinctions between arbitration and "judicial settlement," apart from the single fact that in arbitration the judges are appointed by the parties, fail under examination. By the Statute of the Permanent Court of International Justice, the parties may, just as in any arbitral court, fix the rules by which they are to be judged, article 38 in terms providing that the court "shall apply," first of all, "international conventions, whether general or special, establishing rules expressly recognized by the contesting states." So, municipal courts, in

No expression as to the judicial nature of international arbitration could be clearer than that of the Brazilian publicist, Clovis Bevilacqua, who, while observing that the settlement of international disputes may be reached "by means of decisions of judges freely chosen by the parties," i.e., "arbitration" (*arbitramento*), declares that States ought not to appeal to the violent means of war before trying this pacific solution. Moreover, for the settlement of its disputes, the Society of States, says this eminent authority, has need of a justice of its own (*uma justiça que lhe seja propria*). While direct negotiations, good offices and mediation are conciliating expedients, by which justice no doubt may be attained, they do not, says Bevilacqua, "attain to the superior form of a judgment (*sentença*), which is a declaration of law, in the case in dispute, having force to bind the litigant parties"; and he adds:

As States are Sovereign, and do not recognize an authority superior to themselves, arbitral justice alone can be applied to them, and the arbitrations are judgments that decide, contentiously, international questions, binding the States to execute them, not coercively, since there is no power to constrain them, but impelled by their own dignity, since every arbitral judgment presupposes an agreement to accept the decision in good faith, and by the pressure of international opinion, if not also by their own conviction resulting from the discussion and the judgment.¹

The treatise of Calvo, celebrated Argentine authority, has passed through numerous editions, mostly in French. In the original edition, in Spanish, while observing that the mediator had the character not of a judge (*juez*) but of a friendly counselor, Calvo said that States sometimes submitted their differences to the judgment (*juicio*) of arbitrators named for the purpose; and that arbitration thus had, in international law, the same reason as in the civil law, and might be defined in the same manner, but differed much in its effects, in that there was no tribunal competent to oblige the States to comply with the arbitral sentence.²

To this statement he adhered, with some amplifications, in his subsequent editions, in which one also finds the observation that, while mediation may be employed in all kinds of international questions,

interpreting and enforcing contracts and other instruments, seek to ascertain and give effect to the intention of the parties, and in many cases the parties are permitted to designate the law and the court by which their rights shall be tried. On the other hand, it is admitted that arbitrators, no other rule being presented for them, are to administer the general law of nations.

¹ *Direito publico internacional*, by Clovis Bevilacqua, Rio de Janeiro, 1911, II. 189, capítulo iv, par. 236, *Arbitramento*.

² Calvo, Carlos, *Derecho internacional*, Paris, 1868, I. 409, 411, §§317, 318.

the employment of arbitration, on the contrary, is kept within certain limits inherent in the bases themselves of the law of nations, such as that of the right of national independence, or that of a deep feeling (*sentiment intime*) of which a third State cannot be the judge.¹ His most precise as well as most condensed statements may, however, be found in a dictionary published by him in 1885, and are as follows:

Arbitration, Arbitrator, Definition. In international law, arbitration is the act by which two or more states, being unable to agree between themselves upon the settlement of a dispute, delegate by common accord to one or more arbitrators the task of deciding or decreeing as judge of last resort (*comme juge en dernier ressort*). . . .

Rights of Arbitrators. Arbitrators, although they hold their powers only from the parties, form an independent body, a true judicial court (*un véritable tribunal judiciaire*). In the absence of obligations clearly laid down in the arbitral agreement, they follow in the execution of their mandate (*mandat*) the rules laid down in the civil law. . . .

Arbitral awards. The arbitral tribunal may, before rendering its award, make to the parties equitable proposals for the purpose of reaching a compromise; but this is outside of their proper functions. If the parties reject these proposals, the tribunal must pronounce on the controversy submitted to its decision. . . .

We must not confound arbitration with *mediation*. Mediation implies simply good offices tending towards a friendly conciliation, while arbitration imports a judgment to which the parties who ask for it submit themselves morally in advance and the provisions of which they are bound to carry out.²

Writing on the same subject, Calvo's compatriot and contemporary, Alcorta, incumbent of the chair of international law at the University of Buenos Aires, also speaks of the "arbitral judgment" (*jugement arbitral*); and, after stating that international arbitration may be constituted in different ways as to persons as well as procedure, and that the parties may take as arbitrators either sovereigns, or mixed commissions, or yet learned bodies previously organized, says:

When an arbitral judgment is pronounced by a Sovereign, it is not necessary to exaggerate its importance, for it may happen, as is perfectly allowable, that it was not the result of personal study; and, on the other hand, in his character as representative of a

¹ Calvo, Charles, *Le droit international théorique et pratique*, cinquième édition, Paris, 1896, III. 413, 432, 471 et seq., §§1682, 1706, 1756.

² *Dictionnaire manuel de diplomatie et de droit international*, Berlin, Paris, 1885. The foregoing definitions are in effect abridged and more precise restatements of the matter found in Calvo's *Dictionnaire de droit international*, published earlier in the same year (1885).

State, the arbitrator is not prevented, in pronouncing on the question submitted to him, from taking account of his own interests. But, in the case of an opinion of a mixed commission or learned body, we may not disregard its importance, especially when the decree (*arrêt*), instead of being founded on rules agreed on in advance, rests on principles which the arbitrators considered as consecrated by international observance (*consacrés dans les relations internationales*).¹

We may cite yet a third Argentine authority, still living, who, in a work now in its fourth edition, places arbitration among legal solutions (*soluciones jurídicas*), as contrasted with diplomatic solutions (*soluciones diplomáticas*), the latter comprising direct negotiations, congresses and conferences, good offices and mediation.²

Finally, crossing the Andes, we may invoke the concurrent testimony, emphatic and weighty, of two eminent Chilean authorities, one of the past and the other of the present—Bello and Cruchaga.

The mediator, says Bello, does not endeavor to insist on strict justice (*una rigurosa justicia*), because his character is not that of a judge (*juez*), and the parties are not obliged to accept his advice; but, when they have agreed to submit themselves to the judgment of an arbitrator, they are obliged to execute it, unless by a decision manifestly unjust he has deprived himself of his character as such. Moreover, in order to avoid any pretext for bad faith on the one side or the other, the point in controversy and the respective claims should be clearly defined in the arbitral agreement, so as to set bounds to the arbitrator's powers; and, if the decision does not transgress those limits, it is necessary to comply with it or to give indubitable proofs that it was the work of partiality or corruption.³ It is proper to add that Bello was chosen in August 1864 as umpire of the mixed claims commission under the convention between the United States and Ecuador of November 25, 1862, but he was compelled by ill health to decline the post, and in the following year he died, thus losing the opportunity to exemplify in practice his conception of the high and judicial character of the arbitral office.⁴

Cruchaga, ambassador as well as jurist, classing arbitrators as

¹ Alcorta, Amancio, *Cours de droit international public*, Paris, 1887, I. 132-3. Unfortunately, owing to the lamented death of the author, only the first volume of this excellent work appeared.

² Bidau, Eduardo L., *Derecho internacional público*, 4th ed. Buenos Aires, 1924, II. 5-37.

³ Bello, Andrés, *Principios de derecho internacional*, nueva edición . . . por D. Carlos Martínez Silva . . . Madrid, 1883, 292-3.

⁴ Moore, *History and Digest of International Arbitrations*, II. 1571, where, referring to his selection for the post of umpire, I said: "His fame as a publicist and scholar made his appointment eminently a fit one."

judges (*jueces*), concurs with Fiore in deprecating the practice by which a sovereign, when named as arbitrator, delegates the task of examining and deciding the question to others. Cruchaga considers this practice to be dangerous in the extreme, because it tends to deprive arbitration of its true character as a judicial institution (*verdadero carácter de una institución judicial*), introducing into the process administrative forms. More remote, undoubtedly, from political disturbances is, he says, the award given by jurisconsults, specialists of repute in international law, faculties of law, or tribunals of professors; and he remarks upon the designation of the Court of Cassation of France as arbitrator on two occasions, on one of which the French government itself was an interested party. In keeping with his view of the strictly judicial nature of the arbitral function, Cruchaga inveighs against the investing of an arbitrator with the powers of a friendly compounder (*amigable componendor*) as contrary to all scientific conceptions of arbitration. In reality, as the points submitted to arbitration must, he says, be susceptible of a solution in conformity with fixed and immutable principles of law, it denaturalizes the system if power is given to the arbitrator to search for a solution not in strict law but in good will and equity (*de benevolencia y de equidad*).¹ The mediation of a friendly power may be accepted or requested in such cases, or a suitable compromise may be reached by the chancelleries; "but let us not," says Cruchaga, "presume to say that in such procedure there is arbitration."²

(2) AWARDS AS A SOURCE OR EVIDENCE OF LAW

Being desirous to deal with the substance of things, and, by avoiding as far as possible wars of epithets, to save a great cause from needless injury and attrition, I have placed the words "source" and "evidence" in the alternative, thus leaving to their partisans, who may often agree except in terminology, the unchallenged enjoyment of the title they prefer.

Wheaton ranges the sources of international law in six groups, the fourth of which includes: "The adjudications of international tribunals, such as boards of arbitration and courts of prize." As between these two, however, he says that "greater weight is justly attributable to the judgments of mixed tribunals, appointed by the joint consent of the two nations between whom they are to decide,

¹ He cites here Rolin-Jaequemyns, *Revue de droit international*, 1891.

² Cruchaga, Miguel, *Nociones de derecho internacional*, tercera edición, Madrid, 1923, I. 569-70, 574. Similar statements will be found in his second edition, 1902, I. 298, 309-11.

than to those of admiralty courts established by and dependent on the instructions of one nation only.”¹

George Grafton Wilson, writing in 1910, truly said:

In recent years the practice of reference of questions liable to cause disagreement among states to international tribunals has become common . . . Many temporary and special courts have been instituted. These tribunals usually decide the questions before them on broad grounds, and their decisions become precedents for subsequent tribunals. The decisions of the later tribunals more and more refer back to those of earlier years, and a considerable body of rules, practically a part of international law, has thus developed.²

Stockton, writing in 1914, also enumerates among the sources of international law the decisions of arbitral tribunals.³

The citations just made from works written in the United States are merely illustrative. Other citations might be given.

British authorities are to the same effect.

Wildman, in a work of exceptional merit, says that “the evidence of the custom of nations is to be collected from laws and ordinances; from treaties, so far as they are declaratory of the law of nations; from the works of text writers, and from the judgments of international tribunals.”⁴

The “universal consent of nations . . . as implied by usage, custom, and practice” is, says Phillimore, “evidenced in various ways,” among which he specifies “the decisions of International Tribunals.”⁵

Sir Edward Creasy treats of the subject with exceptional explicitness and detail. In answer to the question “where are we to find the proofs that any particular portion of International Law has been made International Law by the implied consent of Civilized States?” he specifies the writings of the great publicists;⁶ the decisions of prize courts,⁷ and of other national courts, and “the Decisions of International Boards of Arbitration.”⁸ He observes that many important questions of international law come in peace as well as in war before

¹ Wheaton, *Elements of International Law*, 2d ed., by Lawrence, 30; Dana's ed. 26, §15. The statement of Wheaton is adopted in Taylor, Hannis, *A Treatise on International Public Law*, Chicago, 1901, §33.

² *Handbook of International Law*, 1910, 9, 12, §4.

³ Stockton, Charles H., *Outlines of International Law*, 17.

⁴ *Institutes of International Law*, by Richard Wildman, Philadelphia, 1850, I. 18. It may be superfluous to remark that the Philadelphia edition is a reprint.

⁵ *Commentaries on International Law*, 3d ed. 1885, I. 68.

⁶ He mentions Kent, Polson, and others.

⁷ For this he cites Phillimore.

⁸ He cites on this point Polson and Wheaton.

the tribunals of civilized nations, and that "the expositions of this law, which are thus obtained, are observed throughout the civilized world always with respect, but of course with an amount of respect proportioned in each case to the dignity of the court, to the character of the judges constituting it, to the concurrence or diversity of their opinion, to the fulness of the discussion, and to the learning and wisdom displayed in the judgment itself"; and he adds:

Similar respect, similarly varying in degree, is paid to the decisions on general principles of the Mixed Boards of Arbitration, which are from time to time appointed by States for the amicable settlement of their differences.¹

Lorimer, while approaching the subject from the point of view of those who hold that, so long as there is no authority supreme over all States, there can be no "international judges" in the sense in which the word "judge" is used in municipal law, goes on to say:

As there are no international judges, there can, of course, be no international judgments, and, as a precedent is the result of a series of consistent judgments, there can be no international precedents, in the sense in which there are national precedents. But as treaties supply, in an imperfect manner, the place of legislative enactments, the awards of arbiters and the judgments of mixed courts of prize appointed under treaties, to a corresponding extent, take the place of judicial decrees; and a series of such awards or judgments, if tolerably consistent, would loosely correspond to precedents. It is in this direction, almost exclusively, that many persons look for the development of the positive law of nations; and though the hopes excited by the transactions which took place in the Alabama case were extravagant, there is no reason to doubt that arbitration under special treaties, and even a species of judicial action under general and permanent treaties, will henceforth form an important factor in the progress of international law.²

Among the "important factors" that "influence the gradual growth of new rules of international law," Oppenheim places "arbitral awards."³

Westlake, treating of the "best evidence of the consent which makes international law," says:

The increasing frequency of international arbitration now calls for the special mention, among the evidences of this class, of the judgments of arbitrators, particularly of such as may be given by the

¹ Creasy, *First Platform of International Law*, 78, 81, 83.

² Lorimer, J., *The Institutes of the Law of Nations*, Edinburgh and London, 1883, I. 51-2.

³ *International Law*, by L. Oppenheim, London, 1905, I. 24; 3d ed. 1920, I. 23.

court established in pursuance of The Hague convention of 1899, to which practically all states of international law are parties.¹

Lord Birkenhead mentions, among the "chief agencies by which the rules of international law are ascertained," the "declarations of law made by tribunals of international arbitration."²

In France, Renault, referring in 1879 to the jurisprudence of individual States as a source of evidence of international law, says:

Mixed courts, that is to say, courts composed of judges appointed by two countries to decide an international question, offer a greater guarantee of impartiality than local courts: they draw their inspiration more directly from the law of nations and less from this or that special law. These courts may be constituted in a permanent manner; this is rare, but it has sometimes been done in order to adjudicate prizes made in pursuance of conventions establishing the right of visit for the repression of the slave trade. They may be constituted to determine a particular dispute; see, for example, the Treaty of Washington of May 8, 1871, arts. 1, 12, 22.³

Chauveau, contrasting the influence of the decisions of international courts with that of the decisions of national courts on questions of the law of nations, on the development of customary law and the preparation of conventional rules, says:

The mixed courts, the decisions of arbitrators, offer a greater guarantee of impartiality, and their judgments (*jugements*) are very helpful to a practical understanding of the customary or conventional law of nations.⁴

¹ International Law, 2d ed. Cambridge, 1910, I. 16.

² International Law, by the Earl of Birkenhead [F. E. Smith], 6th ed. London and Toronto, 1927, 22-3.

³ Renault, Louis, *Introduction à l'étude du droit international*, Paris, 1879, 46. In immediate connection with his reference to the tribunals established under articles 1, 12, and 22 of the Treaty of Washington of May 8, 1871, respectively relating to the Alabama claims, other civil war claims, and the fisheries dispute which was dealt with by the Halifax Commission, he remarks that the decisions of courts constituted for the determination of a particular dispute do not make a very great contribution to science, since the arbitrators are often preoccupied less with principles than with bases of arrangement, and avoid general declarations which may offend one or the other party. In the case of the Alabama claims, it may be noticed, the treaty laid down rules for the government of the arbitrators; and in the case of the Halifax Commission, the work was largely of a special and technical kind. The case would have been the same if the treaty had referred the execution of its stipulations to a tribunal previously in existence. For a later expression of Renault's views, see *supra*, liii. Prior to the publication of my *History and Digest of International Arbitrations*, by the Government of the United States, in 1898, little was known of the vast mass of decisions of international arbitral tribunals involving the interpretation and application of general principles of international law. In 1905 there came the first of the two volumes of the *Recueil* of de Lapradelle and Politis.

⁴ *Le droit des gens ou droit international public*, par M. E. Chauveau, agrégé des Facultés de Droit, Professeur à l'École de Droit d'Alger, Paris, 1891, 87.

Chrétien, in 1893, marshalling the different kinds of acts which attest the existence of rules of international law, includes judicial decisions, which he divides into three classes, respectively emanating from ordinary courts, prize courts, and courts of arbitration.¹

The declaration of de Lapradelle and Politis that arbitration, as a true judicial institution between States, and a legal instrument of peace and progress "gives an effective sanction to the existing law and, by the establishment of a jurisprudence, contributes to the formation of the law of the future," has already been quoted.²

Bonde, discussing only two years ago the sources of international law, which are, in his opinion, custom and treaties, says that the force of rules purely customary has become so great, "especially when they have been recognized by the decisions of courts of arbitration or inserted in treaties," that a State which should disown them would expose itself to grave measures on the part of other States; and he mentions, among the various acts and influences by which they are formed and affirmed, "the decisions of courts of arbitration."³

Speaking thirty years earlier in the same sense, the celebrated authority, Alphonse Rivier, declared: "there is an international justice, whose judgments may directly attest the international custom: it is arbitration between states."⁴

Martitz, in Germany, mentions the decisions of international tribunals as furnishing precedents by means of which the law may be built up.⁵

So Liszt, in classifying the sources of customary law, designates the decisions of international tribunals and especially of arbitral tribunals. He further observes that express legal rules may be, among other sources, in the decisions of arbitral tribunals that have been authorized by the litigating parties to make the law (*die Funktion der Rechtssatzung*).⁶

¹ *Principes de droit international public*, by Alfred Chrétien, and annotated by Paul Nachbour, Paris, 1893, 16. The author went on to say that arbitral courts had then been "rarely assembled"; that they had "usually had only to interpret, on very limited points, conventional texts invoked by the contestants in a contrary sense"; and that, "always invested with a perfectly definite and very restricted mandate, they have almost never found occasion to formulate a general principle." Curiously, he mentions, as an exception, the Geneva award of 1872 on the Alabama claims, although he adverts to the three rules prescribed by the treaty. See, as to the lack of information, prior to 1898, concerning the number and variety of arbitral decisions, footnote 3, *supra*, lxxxi.

² *Supra*, liii.

³ Bonde, Amédée, *Traité élémentaire de droit international public*, Paris, 1926, 10-11.

⁴ *Principes du droit des gens*, par Alphonse Rivier, Paris, 1896, I. 36.

⁵ Martitz, Ferdinand von, *Völkerrecht*, in *Systematische Rechtswissenschaft*, Berlin and Leipzig, 1906, 433.

⁶ Liszt, Dr. Franz von, *Das Völkerrecht*, 5th ed. Berlin, II. 505 et seq. §38.

Ullmann, treating custom as an original source of international law, places the decisions of international arbitral tribunals among the proofs of the existence of a common legal conviction.¹

Speaking in a similar vein, Felter-Moreno remarks that, with the repetition of arbitral decisions, they will come to have the power to form a true international jurisprudence, so that the rules of international law will come to have greater obligatory force than they have today.²

Alcorta concurs with Wheaton in the view that, as between the decisions of prize courts and the decisions of international boards of arbitration, greater importance is to be ascribed to the latter as evidence of international law, for the reason that prize courts, being constituted by a particular State, must decide in accordance with the law of that State, if it imposes an applicable rule; while arbitral commissions, unless the parties have laid down rules in advance, have only to apply the principles of international law. As regards the weight to be given to the judgments of such tribunals in their character as judicial decisions (*décisions judiciaires*), he observes that this would always depend on the criticism to which they may be subject from the point of view of general principles, as well as on the way of looking at, or rather the authority accorded to, the opinions of publicists, of authors, or statesmen, and so on, since it is to be supposed that the tribunals would be composed of such persons.³

(3) INTEGRITY OF ARBITRAL PROCEEDINGS

Calvo enumerates six cases in which the parties are authorized to refuse to accept and execute an arbitral judgment. These are: (1) where the award was unauthorized, or was rendered outside of and beyond the terms of the agreement, as was the mediatorial proposal made by the King of the Netherlands under the treaty of 1827;⁴ (2) where the arbitrators were under a legal or moral incapacity, absolute or relative, as where they were bound by previous engagements, or had in the formulation of their conclusions a direct interest unknown to the parties who chose them; (3) where the arbitrators or one of the parties had not acted in good faith, as when the arbitrators were bought or corrupted by one of the parties; (4) where one of the parties was not heard or enabled to vindicate his rights; (5) where the

¹ Ullmann, Dr. E. von, *Völkerrecht*, Tübingen, 1908 (*Das öffentliche Recht der Gegenwart*), III. 44.

² *Manual de derecho internacional público*, Madrid, n.d., II. 16. See, *supra*, lxi.

³ *Cours de droit international public*, I. 132-3. See citation of Alcorta, *supra*, lxxvi.

⁴ *Supra*, lxxv.

award bore on things outside the submission; (6) where the tenor of the award was absolutely contrary to the rules of justice and hence could not be the object of a compromise.

Of the third case—that of fraud and corruption on the part of arbitrators—the learned author was obliged to resort to the middle ages, citing from Pufendorf the case in which the Emperor Maximilian and the Doge of Venice, after submitting their dispute to the arbitration of the Pope, Leo X, each resorted to intrigue in order to obtain an award in his own favor.¹ When Calvo wrote his text, however, charges of fraudulent conduct were pending against two of the three members of the mixed claims commission which had sat at Carácas under the convention between the United States and Venezuela of April 25, 1866; and after investigation of the charges the two Governments entered into a convention for the rehearing of the claims by a new commission. The new commission, by reason of the high character and ability of its members, and the learning and impartiality of its judgments, materially contributed to efface the recollection of the solitary instance, in all the multitude of arbitral proceedings in modern times, of corruption on the part of an arbitrator.²

Constantly cited as proof of the inefficacy of international arbitration are the well known cases of Weil and La Abra, decided by the umpire of the mixed claims commission under the convention between the United States and Mexico of July 4, 1868. In these two cases large sums were awarded against Mexico, amounting to slightly more than a fourth of the total of the awards. The claimants played for high stakes. Subsequently the agent of Mexico presented to the umpire a motion for a rehearing, alleging, on the strength of new evidence and a reexamination of the old, that the awards were procured by false and perjured testimony. The umpire, on the ground that he could consider only evidence which had been before the commissioners and which they had examined and transmitted to him, as well as on other grounds duly stated, held that he had no power to grant a rehearing; but he significantly added that there were courts of justice in both countries in which perjurers could be tried and convicted, and that he doubted “whether the government of either would insist upon the payment of claims shown to be founded upon perjury.” Eventually, the Court of Claims of the United States, under a reference by an act of Congress, held the charges against the claimants to be well founded; and, its judgment having been affirmed by the Su-

¹ Calvo, *Le droit international*, 3d ed. III. 485, §1774.

² Moore, *History and Digest of International Arbitrations*, Washington, 1898, II. 1659 et seq.

preme Court, the United States refunded all the money that had been paid by Mexico on the awards, including a part that had been distributed among the claimants. The total number of claims presented to the commission was 2,015, of which 25 were later consolidated and 7 withdrawn. The commissioners themselves disposed of 1,488 cases; the umpire dealt with 495.¹

In the cases of Pelletier and Lazare the United States declined to enforce two awards made against Haiti by an arbitrator appointed under a diplomatic agreement between the two countries.² The arbitrator was a person of character, ability and distinction, having been a Justice of the Supreme Court of the United States. No doubt he often had in that capacity concurred with his associates in overruling the decisions of inferior tribunals on grounds not essentially unlike those on which the President and the Secretary of State of the United States decided not to accept and execute his award against a friendly government; and yet when, being no longer in a position to overrule others, he was himself overruled, it was suddenly assumed that international arbitration had again exemplified a possibility of error peculiar to itself, and, amid the characteristic reproaches, the mute protest of the great multitude of unchallenged adjudications passed unnoticed, while the daily reversals of municipal judgments were silently condoned. Indeed, so strangely does the profuse forgiveness of national courts, for their capacity for feeding the passion for appeals, contrast with the quick censure of international courts for failing to render judgments which neither interest nor bright-eyed Science can assail, as to justify the belief that the international tribunals can afford to be judged simply as a human institution, by the record they have actually made. A recent writer, Garner, referring chiefly to the criticism of certain adjudications of the Permanent Court of Arbitration, especially in connection with the charge that they were based wholly or in part on compromise, says:

This criticism has not always been justified. In some instances the complaint emanated from the losing party or its sympathizers, and in other cases the element of compromise was hardly discernible. In any case, it is a fair question to raise whether the disposition to compromise differences where it is impossible to resolve them by the application of strict legal principles, since there may be none applicable to the dispute, is, after all, a defect. On the contrary, it might be argued that it is an advantage and even a necessary

¹ Moore, *Hist. and Dig. of Int. Arbitrations*, II. 1324. The final action of the United States took place after the work here cited was published, but the full history of the case down to and including the judgment of the Court of Claims is given.

² *Id.* II. 1749 et seq.

element in the settlement of certain classes of disputes, if they are to be settled peaceably. Finally, it may be remarked that many decisions of municipal courts have not been lacking in which the elements of compromise were present.

Naturally the system of international arbitration has been criticized because there have been cases which resulted in miscarriages of justice. . . . It should be said . . . that these allegations often emanated from the losing party and they were not always well-founded. In some cases also where injustice was generally admitted it resulted from errors and other causes such as frequently occur in the administration of justice by municipal courts. Considering the hundreds of cases that have been arbitrated, the number against which there were reasonably well-founded charges of miscarriages of justice has been remarkably small. An examination of an equal number of the decisions of the municipal courts of any country would doubtless reveal a larger proportion of cases which were open to attack upon similar grounds.

In the last place, the system of international arbitration has been criticized on the ground that it has contributed little or nothing toward the development of international law in the sense that municipal law has been developed by judicial tribunals. . . . This criticism is in part well-founded, but, after all, the principal function of arbitration is to settle international differences and not to develop a body of international law. . . . The lack of continuity of jurisprudence has resulted from the system of *ad hoc* arbitral tribunals; with a really permanent arbitration court the reasons for the criticism would in large measure disappear. Finally, it may be remarked that arbitral tribunals have in fact generally shown as great respect for the well-settled rules of international law as national courts have shown; they have applied those rules in the cases in which they were applicable and while they have not followed strictly the doctrine of *stare decisis* they have frequently quoted and relied upon earlier decisions to support their own conclusions. The truth is, much of the criticism directed against arbitration on the ground that it possesses certain defects which are lacking in a system of "judicial settlement" is unjustified. In reality, the difference between the two modes of settling disputes is by no means so great as some writers have imagined.¹

¹ Garner, J. W., Recent Developments in International Law, 1925, 522-5. On the difference or distinction last mentioned, the learned author quotes the following passage: "It is said that heretofore we have had arbitration, but that arbitration has failed, and that now we are to have 'judicial settlement' of international disputes. Such statements illustrate the propensity to accept phrases rather than to search for facts—I venture to assert that the decisions of those international tribunals are characterized by about as much consistency, by about as close an application of principles of law, and by perhaps as marked a tendency on the part of one tribunal to quote the authority of tribunals that have preceded it, as one will find in the proceedings of our ordinary judicial tribunals. One cannot study these records without being deeply impressed with that fact, and without discovering how lacking in foundation is the supposition that when we talk of the 'judicial settlement' of international disputes we are presenting some new device or new method." John Bassett Moore, Proceedings of the Academy of Political Science, Vol. 7, 1917, No. 2, 21-2.

Garner, in substantiation of his statement that, in fact, arbitrators have in the cases before them, generally applied the settled rules of international law, and have frequently quoted and relied upon earlier arbitral decisions in support of their own conclusions, refers to the proofs found in Ralston's *International Law and Arbitral Procedure*, and in another work which Ralston mentions.

In his preface Ralston says:

Within the past hundred years there has grown up a body of law and procedure relating to the functions and operations of international arbitrations. The precedents creating this are to be found to a great extent in Moore's *Digest of International Arbitrations* to which the United States has been a party, and as to ten commissions, in *Venezuelan Arbitrations of 1903*; . . . It has been the effort in this book to include not only decisions specially relating to arbitral law and procedure, but also the opinions, upon points of international law, of the gentlemen who have taken part in the settlement of disputes among nations . . .

It is true, as is repeatedly shown by decisions herein cited, that the doctrine of *stare decisis* is not accepted by arbitral commissions. Nevertheless, arbitral opinions will be continually found filled with references to the conclusions of other tribunals, as well as to the views of distinguished writers upon the subject of international law, and an arbitrator or umpire in his decisions will with hesitance reject the solemn findings of those who have theretofore in international commissions reached definite conclusions as to controverted points. . . .

An examination of this work will demonstrate that a study of arbitral sentences and the reasons underlying them will furnish information and guidance upon many points as to which up to the present time the text writers are comparatively silent. For instance, we shall find discussed quite at large the significance of the so-called "Calvo Clause" in contract cases, a subject but little considered by the writers of works of international law. In other words, in this branch of legal science, as has often been the case in other branches, tribunals in their conclusions are in advance of the speculations of the scholars.¹

With criticisms particularly levelled at decisions of the Permanent Court of Arbitration, Baron Descamps specifically deals in the following terms:

¹ Ralston, Jackson H., *International Arbitral Law and Procedure*, Boston and London, 1910. The author was himself the reporter of the *Venezuelan Arbitrations of 1903*, and was the umpire of one of the mixed commissions. In another passage in the preface to the work here cited, Ralston says: "In the preparation of this work it has not been the purpose of the writer to exploit any particular theory or to indicate, save in rare instances, errors of law of which he has believed some commissions may have been guilty. It is rather to place before the reader all of the findings of arbitrators upon propositions presented to them, to the end that the student or practitioner may be informed relative to all points so far developed in discussions before international commissions."

The arbitrators at The Hague have, it is true, been reproached with a wide interpretation of their powers, when they had not received formal authorization for that purpose; with having in certain of their judgments done the work of pacification rather than the work of justice, and in other cases with having preferred equity to strict law. Such reproaches, which should be more precisely stated in order to have any value, have in any case only an accidental bearing; and if the first, in case it should be justified, would constitute a departure not easy to explain from the true mission of arbitrators, it is necessary in order to appreciate the second to take full account of the rôle which equity may legitimately fill in the application of international law. From the point of view of the jurisprudential function as an auxiliary in the development and clarification of law it no doubt is possible that all the arbitral decisions rendered at The Hague have not the same merit. But in examining the solutions arrived at we should remember that the combination of facts which give room for the practical application of the law varies infinitely; that all cases do not equally afford an opportunity for drawing up judgments founded on principles which illuminate with brilliant lights the legal sphere; that the fact of clinging to some particular pertinent and relative point, instead of essaying to resolve all questions of law which are found to be more or less involved in a case, is a phenomenon which is not foreign to the functioning of the highest national courts of justice in the various countries; that finally, if, in the face of a positive and clear rule of law the duty of one called to administer a jurisdiction is to apply the rule of law, equity is in international law, as well as in all national law, the indispensable complement of positive law (*droit positif*). For the judge whose inescapable duty it is to decide is often, by force of circumstances, constituted a minister of equity charged with supplementing by the lights of his conscience and of his reason the obscurity, the insufficiency or the silence of the positive law; and certainly, the gaps and the imperfections of the law of nations are not of such a nature as to diminish the importance of that task.¹

Additional proof of the integrity and judicial conduct of international arbitrators may be found in the testimony, lately published, of a competent authority who has specially investigated certain current suppositions as to the defects of arbitration. With reference to what he calls the assertion of the "pioneers of judicial settlement" that "arbitrations have in practice been vitiated by compromise," he remarks, in the first place, that "a slight element of compromise is inevitable in every form of judicial procedure and is by no means unfamiliar even in our municipal courts." On this point he pertinently quotes the statement of Sir Thomas Barclay to the effect that the reversal of judgments on appeal in national courts in many instances

¹ Note of Baron Descamps, Advisory Committee of Jurists, The Hague, 1920; Proceedings, II. 44-50.

shows that "justice is often merely a term for decision between two rival claims both equally arguable";¹ and affirms that, when this is taken into account, "an examination of the awards of tribunals of arbitration in modern times does not support the view which the critics of arbitration have suggested." Adverting then to the criticism of various well known cases, including some of those decided by the Permanent Court of Arbitration, he finds that "a perusal of The Hague Court reports seems to indicate that as a whole the decisions were given after a careful examination of the rules of international law conceived to be applicable." He finally submits "that plans for the further development of international arbitration should proceed on the assumption that in its modern application at least it rests on a juridical basis"; and concludes:

This is really of fundamental importance, and a failure to recognize it has led to a good deal of confusion, and among other things has caused misunderstandings as to the nature and distinction between arbitration and judicial settlement. That distinction may in fact be reduced to a purely procedural distinction, and it depends on the fact that in arbitration the arbitrators are appointed *ad hoc* by the parties, whereas in pure judicial settlement there must be a permanent court. In both the process is an essentially legal one.²

As it has fallen to my lot to make perhaps a more extensive examination than any one else has done of the actual records of international arbitrations, I may venture to say that the conclusions reached by the investigators just cited completely coincide with my own. I have failed to discover support for the supposition that international arbitrators have shown a special tendency to compromise, or that they have failed to apply legal principles or to give weight to legal precedents. Indeed, even in the abridged form in which many of the decisions cited in my *History and Digest of International Arbitrations*, published in 1898, were necessarily given in that work, nothing is more striking than the consistent effort to ascertain and apply principles of law approved by the best authorities, and to follow pertinent prior adjudications where any existed. Moreover, this effort was materially aided by the appearance, through a long succession of years, before the numerous tribunals that sat at Washington, of eminent counsel, such as James Mandeville Carlisle, Caleb Cushing, and J. Hubley Ashton, learned in international law, who bore on from

¹ Barclay, *New Methods of Adjusting International Disputes and the Future*, 86.

² *The Judicial Basis of Arbitration*, by R. Y. Hedges, Faulkner Fellow and Assistant Law Lecturer in the University of Manchester, *The British Year Book of International Law*, 1926, 110-20.

commission to commission the accumulating jurisprudence. An additional assurance was also found in the high average of the arbitrators in character, ability and legal attainments.

On the other hand, I cannot help believing that at least some of those who have been led to entertain unfavorable impressions of arbitral judgments have shown a tendency to misconceive and overrate what is called the "judicial" element in the conclusions of municipal courts, as well as to misconceive and overrate the element of "compromise" involved in the conclusions of international arbitrators. While the decisions of international arbitrators, like the decisions of municipal courts, have the character of final judgments, and are in this sense alike "judicial," we may safely affirm that there is little opportunity in the affairs of men for purely "judicial" deliverances, in the sense of applying clear and unquestionable law to plain and indisputable facts, not only without any element of compromise or adjustment, but with such certainty and lustre that they who run may read and not differ. Such things are not of this world. Why do courts divide? Why do judges dissent? Why does the single judge hesitate and reserve his decision, and, when he eventually utters it, confess to the doubts that have troubled him and have rendered the result uncertain? The answer to these inquiries is found in the fact that such are the processes of human thought as applied to human transactions. Our conclusions represent the anxious balancing of conflicting considerations and the effort, if we be honest, to give the greater weight to those that may seem to us to be the more meritorious. It is, therefore, no reproach to international arbitrators, nor does it impeach their integrity of purpose or the judicial character of their acts, to admit that, as human beings determining human disputes, they have been subject to the limitations of human thought, and may occasionally have found themselves, as other judges have done, in straits in which, as Burke has said, "the wisest may well be perplexed."

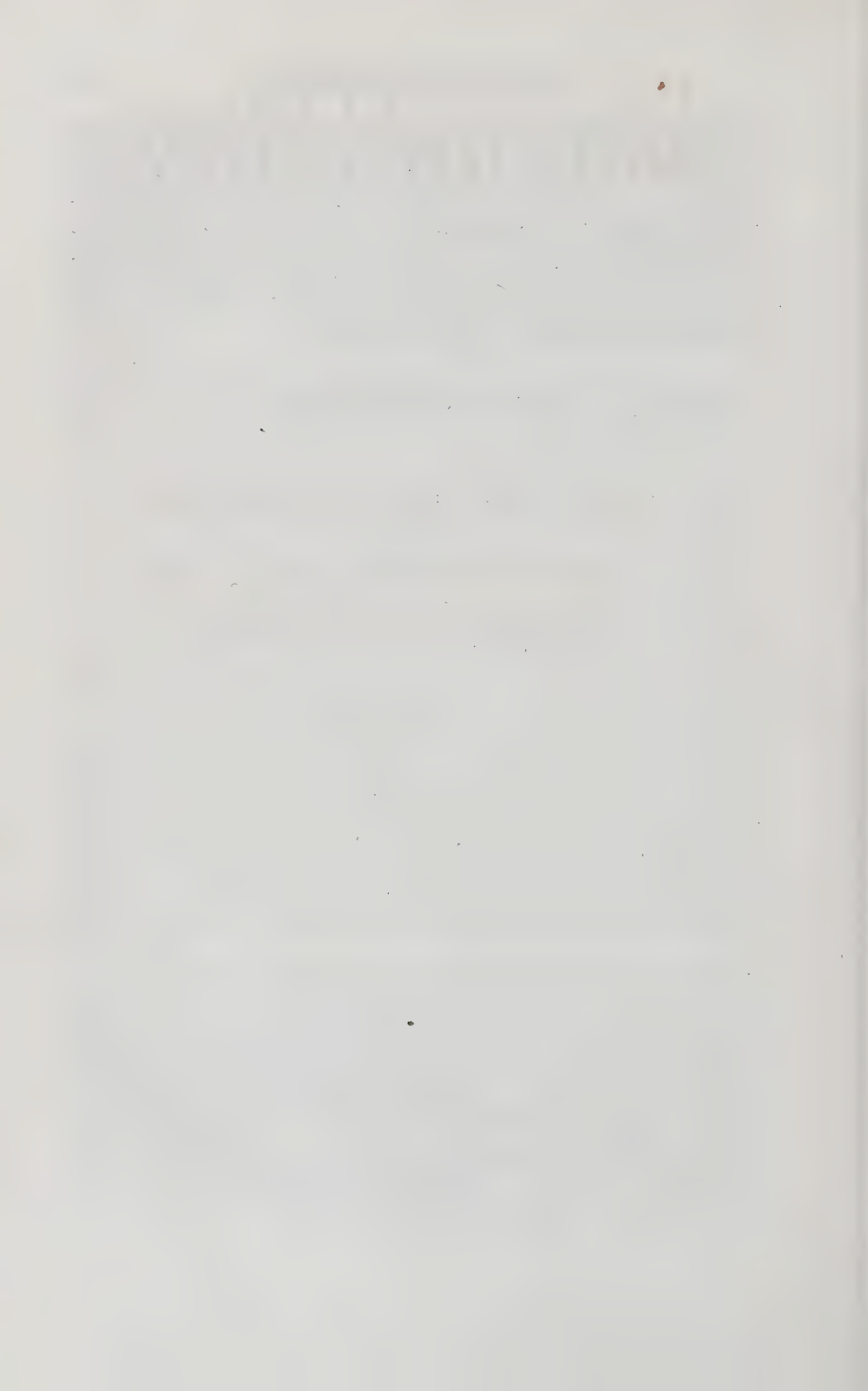
In connection with what has just been said there may be cited the observation of Sir Frederick Pollock that, in the administration of justice, the cases form a small minority where the difference "turns merely upon the application of the law to undisputed facts," and that "the process of forming a judgment as to the truth of the facts, when conflicting accounts are offered, is itself an approximate one at best for human faculties."¹ On the other hand, Judge Cardozo, adverting to what he calls "the yearning for mechanical and formal tests," declares that "principles and precedents," instead of being "the

Jurisprudence, 4th ed. 1918, 44.

outcome of a quest for certainty," are in reality "the outcome of a quest for probabilities," and, being thus generated, "are in truth provisional hypotheses, born in doubt and travail, expressing the adjustment which commended itself at the moment between competing possibilities"; and he particularly warns against the notion that, in analyzing the elements that shape the genesis and growth of law, "any one is invariably to be preferred over the others, that logic must always yield to history, or history to custom, or all to justice or utility as constituents of the social welfare."¹

J. B. M.

¹ Cardozo, *The Growth of Law*, Yale University Press, 1924, 67, 69-70, 78; citing Holmes, vol. 1, *Continental Legal History Series*, 46.



INTERNATIONAL ADJUDICATIONS

MODERN SERIES

VOLUME I

SAINT CROIX RIVER ARBITRATION

Mixed Commission under Article V of the
Treaty between Great Britain and the
United States of November 19, 1794

VOLUME I

NEW YORK
OXFORD UNIVERSITY PRESS
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1929

PREFACE

The St. Croix River Arbitration enjoys a peculiar preeminence. As the first of the three distinct arbitrations for which the treaty between Great Britain and the United States of November 19, 1794, provided, it marks the revival in modern times of the practice of international arbitration, which religious, colonial, and commercial struggles had so long held in suspense, and thus occupies the first place in the second of the two series—the ancient and the modern—into which the present work is divided. In this sense it constitutes an epoch in the history of the application of the judicial method to the settlement of international disputes. But, while it thus possesses a world-wide general interest, it also has a profound local significance, in that it marked the beginning and laid the foundation of the progressive amicable determination of the boundaries between the United States and the British dominions in America.

The record of the transaction is now for the first time presented with an amplitude commensurate with its relative and intrinsic importance. The arguments of counsel, of which, although they have from time to time been cited or quoted in other arbitrations, only fragments have heretofore been published, are reproduced in full. While material of this kind does not make a popular appeal, yet it is, in a case such as the present one, of great value not only to students of geography and cartography, but also to students of history and of international law; and the volumes in which it is printed, being to a great extent permanently absorbed by the public libraries, become increasingly rare and difficult to obtain. Moreover, there is, in this instance, the additional satisfaction of making a well merited, though belated, requital of the labors of the able and accomplished agents of the two governments, who, with unflinching diligence in research, collected, analyzed and laid before the arbitrators all the pertinent and available data of the time.

The laboriousness of the task of preparing the records of the present arbitration for publication could hardly be exaggerated. As the reasons for this are set forth and explained in a closing section, at the end of the second volume, I will not here recite any of the details.

To Mrs. Ila Z. Fields, of the Carnegie Endowment, I am indebted for a faithful copy of the records in the Department of State, at Washington, and for the verification, from other sources, of certain

quotations as to the accuracy of which the agent of the United States, Mr. Sullivan, had entered a word of caution.

While making my acknowledgments to officials of the Department of State, and particularly to Dr. Tyler Dennett, Chief of the Division of Publications, I also desire to express my cordial appreciation of the aid I have received, both in the verification of documents and in the collection of maps, from the American Geographical Society, the New York Public Library, the Library of Congress and particularly its Map Division; from Harvard College Library, the Maine Historical Society, the Massachusetts Historical Society, the Public Archives of Canada, the Library of Columbia University, the United States Coast and Geodetic Survey, and the New York Historical Society; and last, but not least, from Dr. W. F. Ganong, and his writings on the boundaries of New Brunswick.

Finally, my special acknowledgments are due to my secretary, Miss Rhoda Henderson, for her indefatigable aid, not only in the reading and verification of records, but also in the search for and verification of maps to illuminate and explain the text. Nothing could exceed her intelligent and persevering fidelity in the performance of her various tasks, from the beginning to the end.

JOHN BASSETT MOORE.

February 16, 1929.

CONTENTS

VOLUME I

I. TREATY STIPULATIONS	1
1. Definition of the boundary	1
2. Agreement of arbitration	3
3. Explanatory article	4
II. DISPUTE AS TO ST. CROIX RIVER	5
Uncertainty of the descriptions	5
Importance of the River St. Croix	5
Mitchell's map of 1755	6
Mitchell, the cartographer; Mitchel, the surveyor	6
Rivers Magaguadavic and Schoodiac	8
Action of Nova Scotia and Massachusetts	9
Proposals of the United States	9
Agreement for Mixed Commission	10
III. ORGANIZATION OF MIXED COMMISSION	10
Appointment of British Commissioner	10
Appointment of United States Commissioner	12
Preliminary meeting of two Commissioners	14
Appointment of American Agent	15
Appointment of British Agent	18
Official meeting of British and American Commissioners	20
Question as to powers of two Commissioners	20
Selection of the third Commissioner	22
Question as to powers of a majority of the Commission	25
Adjournment to St. Andrews	27
First meeting of full Board	30
Appointment of Secretary	30
IV. BOUNDARY CLAIMS	32
United States claims the Magaguadavic	32
Great Britain claims the Schoodiac	33
V. THE SURVEYS	39
Proceedings at St. Andrews	39
Discussion of instructions to surveyors	40
Chipman's instructions as to the Schoodiac	42
Sullivan's additional instructions	44
Sullivan's further additional instructions	47
Sullivan's instructions as to the Magaguadavic	47
Additional instruction	49
Chipman's additional instructions as to the Magaguadavic	49
Resolution of the Board	50
Oaths of surveyors	50
Agreement as to administration of oaths	51
Agreement as to form of oaths	52
Administration of the oaths	52
Supplies for the surveyors	53
Ratification of Halifax agreement	53

Survey of Passamaquoddy Bay	55
Statement of Mr. Webber	57
Results at St. Andrews: Adjournment to Boston	57
VI. PRODUCTION OF EVIDENCE	59
Meeting at Boston: Delays in surveys and arguments	59
Taking of testimony	61
Question as to Mitchell's map	62
Testimony of Adams	63
Testimony of Jay	64
Letter of Franklin	66
Depositions of Indians	67
Arguments and documentary proofs	68
Adjournment to Providence	69
Meeting at Providence	69
Further proofs	70
Latitude and longitude of St. Croix's source	72
Webber's report on latitude and longitude of mouths of Schoodiac and Magaguadavic	74
Surveys: General map	78
VII. THE ARGUMENTS	79
1. Mr. Sullivan's statement of the case of the United States	83
Arrangement	83
Preliminary observations	83
First Part: Introduction	85
Recital of the claim of the United States	85
Proposition of the United States to reply	86
Proposal for proof	86
That there was no such province as Nova Scotia under grant to Alexander existing in 1783	87
Lands contained in the Charter to Massachusetts and no line of restriction before 1783	87
That the river called Magaguadavic is the boundary	87
Grants and possessions of European Princes	87
Princes of Europe—their right to the soil	88
Virginia granted	88
Name of New England	88
Grant to Gates and others 1606	88
Grant to Hanam and others of New England	88
Settlement of Sagadahock	88
Possession taken of New England, 1602	89
Grant by King James, New England 1620, as far as the 48th degree of latitude	89
Nova Scotia possessed in 1603	89
Origin of the name of Nova Scotia	89
Charters in trust	89
Name of Nova Scotia	90
Kirk conquers Canada and Acadie	90
French continue their claim and their possession as far as they had power to do it	90
Nova Scotia never of consequence before 1739	90

Charter to De Monts in 1603	90
No settlement by Alexander	91
He sells to La Tour	91
La Tour not qualified by a Scottish fief to hold the estate	94
Grant to Alexander considered	94
Surrender at the Treaty of St. Germain	95
La Tour's grants from the French King	95
La Tour a subject of France	95
Not naturalized by England	95
Fief	96
Claim and possession of France	96
Restitution to La Tour's country was so to him if he had a right	96
Commissioners of New England decide La Tour to be a French subject	97
Use of the decision	97
Grant of the French to Governor Razilly	97
French grant to La Tour	98
Lands granted were only part of Alexander's	98
Grant to D'Aulney	98
Controversy of La Tour and D'Aulney	98
Order from the King of France to arrest La Tour	99
La Tour's situation as to allegiance	99
Order not executed	99
The country taken by Sedgwick	99
Grant by Cromwell	99
Granted by Cromwell to Crowne, La Tour and Temple	99
Charles II did not consider the grant of Cromwell as valid	100
Stirling's claim, 1759	100
Governor Bernard's proclamation	101
Grant to the Duke of York	101
Treaty of Breda	101
Castine	101
Phipps takes Port-Royal	102
The grants in each destroyed the right of Alexander	102
Crowne's petition	102
Treaty of Ryswick	103
Alexander sold to La Tour	103
Alexander conveyed	103
No claim pretended under La Tour	104
King could acquire La Tour's property by conquest	104
Anticipation of an answer	105
That the Treaty of 1783 originated the boundary of Nova Scotia	105
Highlands not explored	106
Charter of King James given up, and why	106
New grant to Mason and Gorges	106
To Lord Stirling	106
Charter to Massachusetts by James and Charles	107
Alexander's charter abandoned	107.
The country granted to Massachusetts	107
The Commissioners of 1783 paid no attention to Alexander's charter	108

Second Part: Introduction	108
Charters of Charles	108
Charter of William and Mary	109
Province of Maine	110
Acadie and Nova Scotia	110
The said province on the fourth day of July 1776 became a free, sovereign and independent State	110
Assumed the name of Commonwealth in 1780	110
Confederation	110
Treaty of Peace	111
Boundaries of the States	111
Province of Maine sold to Massachusetts	112
Territory between Acadie and Maine	112
Acadie or Nova Scotia	112
Territory between Maine and Acadie not noticed	112
Authorities attended to	112
Charter an authority	112
Grants not valid without consent of the Crown	113
Quotation from the Charter	113
Nova Scotia included	113
Country known by the name of Acadie	113
Reference to papers before offered	113
De Monts' charter before mentioned	113
No need of enquiry into the name of Acadie	113
Kirk's demand	114
Grant to Charnisay	114
Cromwell's grant to La Tour	114
Treaty of Breda	114
Contention of the French and English on the meaning of Acadie Government extended there	114
Few people there	114
Massachusetts claim from Hutchinson	115
Nelson made Governor	115
Nova Scotia within Massachusetts	115
Government exercised there	115
The fact established	116
Proposal to offer evidence	116
Question why St. Croix was considered as a boundary	116
Duty of the agents to answer the question	116
Agent for the United States will offer facts, etc.	116
Agent of His Majesty to exhibit evidence	117
Idea of St. Croix being a boundary	117
Suppositions and interests of parties	117
Views and interests of Massachusetts	117
That the patent of Sir Wm. Alexander did not suggest the boundary A want of consistency in the British Government	117
The state of the business on the Treaty of Ryswick	118
Claims	118
Lords of Trade on the boundary	119
Crown had a right to explain its own Treaty	120
Vote to rebuild the Fort at Pemaquid	120

Principles of the vote	120
The Province obliged to be content with the King's determination	121
Report of Yorke and Talbot	121
Act to build the Fort at Pemaquid	121
Claim not continued beyond St. Croix after the Treaty of Utrecht	122
Proceedings the same as if the charter had its former extent	122
Petition of Armstrong in 1718	123
Proposal of cession by the Lords of Trade	123
Attempt of restriction	123
Dunbar's attempt.	123
Instructions to the agent	126
Controversy silenced by the war	127
Townships granted east of Penobscot	127
Mauduit's letter	128
Lords of Trade opinion in 1764 on Governor Bernard's grant	129
Letter from the Lords of Trade to Governor Bernard	129
Intentions of Bernard	130
Idea of a new province in 1764	130
Grant from Nova Scotia to Bernard	130
Operation of that grant	131
Question why St. Croix was considered as a boundary	131
Answer	131
Name of St. Croix	131
St. Croix the name of a place as well as of a river	132
Description of St. Croix by L'Escarbot	132
The Agent of the U. S. reserves other remarks upon that author	132
Origin of the name uncertain as to the island spoken of by L'Escarbot	133
Razilly's commission	133
St. Croix the name of a place	133
Surrender of the Charter of New England corporation	133
St. Croix a place	134
Duke of York's patent	134
No reference to Alexander's grant	134
Government under the Duke of York	134
Massachusetts attempt to settle their eastern line	134
Government there	135
Government extended by Massachusetts	135
Idea of preserving the country as part of New England	135
St. Croix the boundary of the Duke of York's patent	136
Conclusion from the facts stated	136
Third part	136
Proposition to show that the Magaguadavic was the river intended	137
Attention to propositions in the British claim	137
Remark on the proposition of the Agent of the King of Great Britain	137
Act of Parliament.	138
Averments from English and French maps, etc.	139
That the Magaguadavic is the true line	139
Satisfactory proof renders the proposed argument unnecessary	139
Maps and authors are of use for a particular end	139
Mouth of the River St. Croix is made the beginning of a boundary to Nova Scotia	140

The Commissioners must have anticipated these observations . . .	140
Passamaquoddy between the Bay of Fundy and the rivers . . .	140
It extends to Oak Bay	140
Schoodiac River	140
Magaguadavic River	141
Neither answers the description in the Treaty exactly . . .	141
River noted in the Treaty	141
Two rivers only in the Bay	141
Southack's map	141
Not accurate as to the position of these rivers	142
Map of the <i>Mémoires</i> of the Commissioners at Paris in 1750 . . .	142
Question defined	143
Lines necessary to the Treaty	144
Jefferys' map	144
Des Barres' map	144
Mitchell's map	144
The President's testimony	146
Mr. Adams' knowledge of the controversy	150
Governor Bernard's orders to Mitchel and Jones in 1764 . . .	151
Argument on Bernard's orders	153
Proposal for witnesses	159
That the settlers under the British Government ought not to con- sider the claim of the U. S. as hard against them	160
The settlers were warned at an early period of their error . . .	160
General court proceedings	161
Governor and Council's proceedings	161
The proceedings of Massachusetts notorious, although no recourse was had to force	161
John Albee warned the settlers	162
Report of Charles Morris considered	162
Report	162
Argument on Morris's report	163
Argument on Morris's report concluded	163
Papers on the table exhibit the evidence of what has been asserted .	164
General Lincoln and General Knox a committee and their report .	164
Conclusion	165
2. Mr. Chipman's Statement, or "First Argument"; and Reply to Mr. Sullivan	169
(1) First Argument	169
Benevolent purpose of Article V	169
No part of Nova Scotia ceded by Treaty of Peace	171
Western limits of Nova Scotia	173
Grant to Sir William Alexander	173
Conformity of grant and Treaty of Peace	175
Name Nova Scotia originated with grant	175
Name and River St. Croix	177
First application of name to River	177
L'Escarbot's account	178
Sullivan's History of Maine	180
Identification of St. Croix Island with descriptions	180
Appropriateness of the descriptions	182

Testimony of the maps	184
Account of Champlain	184
Identification of River Schoodiac with St. Croix	186
Champlain's plan of Isle St. Croix	188
Demotte and De Monts	189
De Laet and other authorities	191
Public grants and other documents	191
Grant to Sieur Razilly	192
Discussions between English and French Commissaries, 1750-1753	194
St. Croix River the common boundary of Nova Scotia and New England under Plymouth Charter	196
Grant to Duke of York	199
Summary of deductions from preceding proofs	200
Confirmatory circumstances	201
Treaty of Breda	202
Charter of Province of Massachusetts Bay, 1691	202
Property in soil under Alexander grant unrevoked	204
Treaty of Ryswick, 1697	205
St. Croix of Alexander grant remains boundary of Nova Scotia	206
True meaning of Charter of 1691	209
Statement of Province of Massachusetts, 1732	210
St. Croix River, called Schoodiac by the Indians, remained boundary of Nova Scotia down to Treaty of 1783	212
Instructions of Governor Bernard for survey, 1764	214
Report of Messrs. Brattle, Bowdoin and Hubbard, 1770	215
Commissions to governors of Nova Scotia	217
Survey by Thomas Wright, 1772	217
Act of Parliament, 1774	218
Source of the St. Croix	225
Expressions in Treaty of Peace	227
Remotest head or spring intended	228
Provisions of Jay Treaty as to the Mississippi	229
Rule of treaty interpretation	229
The northwest angle of Nova Scotia	233
Comparison of boundaries of Nova Scotia and United States	235
The mouth of the Schoodiac	236
Exercise of jurisdiction by Nova Scotia	237
Grants of land	238
Exercise of judicial power	239
Jurisdictional acts westward of Schoodiac or St. Croix	240
Mitchel's deposition of 1784	241
Origin of suggestion that Magaguadavic was the St. Croix	242
Indian testimony as to Cobscook	243
Action of Governor Bernard	244
Untenable contention of American Agent as to survey of Magaguadavic	245
Magaguadavic surveyed in disobedience of Gov. Bernard's orders	246
Report of Commissioners Lincoln, Knox and Partridge, 1784	248
Origin of claim that the Magaguadavic was the St. Croix, 1784	250
Analysis of claim	250
Testimony of the Indians	252

Indian traditions tested by historical narratives	253
Restrictive interpretation of limits of conquests	254
Recapitulation of points established by argument	256
(2) Reply to Mr. Sullivan's argument	259
(a) First part	259
Recapitulation of American contentions	259
Grounds of claim to Magaguadavic	260
Rules for interpretation of treaties	260
Terms of treaty must prevail over opinions of negotiators	261
Testimony of negotiators inadmissible	264
Pertinency and effect of documentary proofs	267
Parties bound by import of treaty	269
Examination of proofs and observations advanced by U. S. as to historical St. Croix	272
Discussion of atlases and maps	274
Mitchell's map	289
(b) Second part	291
Nova Scotia in 1783	291
Origin of name and of province	291
Continued force of grant to Alexander	297
Grant from Alexander to La Tour	308
Government of Province of Nova Scotia revived on cession by Treaty of Utrecht	311
Question of charters	312
Boundaries fixed by reference to Alexander grant	313
Effect of Charter of Massachusetts Bay, 1691	314
L'Escarbot's description of Isle St. Croix	322
Examination of third part of Mr. Sullivan's argument	324
"Report" of Charles Morris	328
3. Mr. Sullivan's rejoinder	335
Notice of filing	335
Table of contents	335
Accumulation of historical facts	336
Adherence to original order of topics	337
Nova Scotia public property in 1783	337
Extinction of Alexander Grant	338
Deed of Alexander to La Tour	339
Charter to Duke of York	339
Grant by Cromwell	339
Claims of Beawes and Waldo	340
Temple's claim and remonstrance	341
Grants to loyalists	344
Summary of contentions	344
Discussion of feudal principles unnecessary	345
True position of Alexander Grant in the controversy	345
Charter of Massachusetts Bay, 1691	346
Opinion of Talbot and Yorke	346
Nature of property granted	347
Relinquishment of part of property by Massachusetts	348
Alexander's American heirs	348
Restatement of contentions on both sides	349

Northwest angle of Nova Scotia the real question	350
Description in the Treaty of 1783	351
Origin of the line in Treaty of 1783	352
Angle not described in Alexander Grant	352
Nor in acts of Government until Treaty of 1783	353
Angle to be found by first ascertaining the rivers	355
Determination of source of St. Croix	355
Uncertainty as to boundaries of Nova Scotia	356
Necessity of curtailing conflicting colonial limits	356
Indefiniteness of divisional lines	357
Northwest angle yet to be formed	359
Evidence as to the St. Croix	360
Lack of precise rules	360
Treaty provisions as to procedure	360
Testimony of negotiators	361
Interpretation of legislative acts	363
Analogies from Vattel	364
Other maxims	366
Position of American Agent as to proofs	368
Admissible evidence under terms of the Treaty	371
Situation in disputed territory about 1700	372
Mitchell's map	373
Virginia Charter, 1606	373
Alexander Grant	374
Patent to Duke of York, 1664	374
Marking and names of rivers	375
Passamaquoddy Bay	376
Passamaquoddy River	377
River Magaguadavic	377
Mitchell's map a composite of earlier maps	377
Examination of it in detail	378
Passamaquoddy Island	378
River Magaguadavic and the St. Croix	380
Maps since July 4, 1776	381
Sheets in Jefferys' atlas, 1777	382
Act of Parliament, 1775	385
Assertions of right by Massachusetts	387
Instructions to Mitchel for survey of eastern boundary	387
Proceedings under the instructions	390
Survey of the Magaguadavic	390
Indian testimony	390
Testimony of surveyors: Deposition of Mitchel	390
Affidavit of Nathan Jones	391
Affidavit of Abraham Duncan	392
Declaration of Israel Jones	394
Deposition and journal of James Boyd	395
Grant to Governor Bernard	397
British Acts of possession and jurisdiction	398
Further consideration of Acts of Parliament	399
Questions to be considered in determining the true St. Croix	401
Descriptions by L'Escarbot and Champlain	401

Discussions at Paris in 1754	405
Writings of De Laet	405
British Agent's citations of the History of the District of Maine	409
The question of the islands	411
Deposition of Thomas Wright	411
Effect of the deposition	413
Historical tests	415
Local data	416
Recurrence to descriptions by Champlain and L'Escarbot	423
Question as to the island where De Monts wintered	423
Testimony of Mr. Pagan	424
Historical evidence as to the alleged identity of the Schoodiac with the St. Croix	425
Ancient charters	425
The Alexander Grant	426
Razilly's patent	426
Examination of later documents	429
Letter of the Lords of Trade, 1700	430
Southack's map	431
Other maps	432
British-French discussions at Paris	433
Interpretation of ancient documents not conclusive as to intention of Treaty of 1783	435
Terms of Treaty of 1794	436
Meaning of phrase "truly intended" in Treaty of 1783	437
The Magaguadavic the river intended	439
Local usage: Indian testimony	442
Local indicia in maps	448
Review of British testimony	451
Deposition of Thomas Wright	451
Deposition of Robert Pagan	455
Deposition of Charles Morris, Jr.	457
Deposition of Alexander Hodges	458
Depositions of James Brown and Jeremiah Frost	462
Comments on depositions	463
Testimony of Hodges	463
Testimony of Wright	465
Testimony of John Frost	471
Testimony of Alexander Nichols	473
Testimony of James Nichols	474
Testimony of William Ricker	476
Testimony of Alexander and James Nichols	479
Testimony of Brown and Frost	481
Testimony of John Curry	482
Summary of results	485
Acts of jurisdiction	486
Observations of Mr. Morris on western limits of New Brunswick	492
The source of the St. Croix	494
Lack of fixed or uniform rules	495
Prevalent considerations	495
Ideas found in early charters	496

Determination of source dependent upon a variety of circumstances	500
Maxims of treaty interpretation	501
The evidence before the Board	508
Former boundaries not adopted as the limits of the independent States	510

VOLUME II

4. Mr. Chipman's Supplemental Argument	3
The course of the litigation	3
Changes in arguments for the United States	6
Testimony of President Adams	7
Testimony of Governor Jay	13
The river delineated on Mitchell's map	15
Governor Bernard's instructions	20
Question of the intention of the Treaty	21
No change in boundary fixed in Alexander Grant	24
Question of the Penobscot	26
Maps other than Mitchell's	27
Southack's map	27
British Agent's interpretation of Southack's map supported by witnesses	32
Confirmation of identity of St. Croix with Schoodiac	38
Southack and Mitchell maps compared	39
British interpretation of maps of Southack and Mitchell confirmed by other maps	41
Addition to the American Agent's argument as to Governor Bernard's instructions	44
Mitchel's original discovery that the Magaguadavic was the St. Croix	45
Mitchel's fourth deposition	51
Bradbury's affidavit	52
Deposition of Israel Jones	56
Testimony of Alexander Hodges	58
Other witnesses	58
Deposition of John Frost	61
Testimony of John Fountain	63
Testimony of William Ricker	64
Testimony of Francis Joseph	64
Letter of Governor Bernard to Governor Wilmot, 1765	68
Errors in rejoinder of American Agent	75
Northwest angle of Nova Scotia	77
River intended by the Treaty of Peace	82
Mitchell's map	83
Name Magaguadavic not found on any map	84
Carriage river	84
Passamaquoddy Island	85
Erroneous attempt to identify Passamaquoddy Island with Deer Island	87
The name Passamaquoddy	89

The Magaguadavic	89
Evidence of maps	91
Instructions of Governor Bernard	91
Testimony of James Boyd	91
Bradbury's testimony confirmed	92
The Schoodiac the St. Croix of De Monts: the crucial question	92
L'Escarbot's map	93
Champlain's description	95
Statement of French commissaries	98
De Laet's narrative	98
Indian account mentioned by Champlain	100
Sullivan's History of District of Maine	101
Champlain's plan of the St. Croix	103
De Monts' settlement on St. Croix Island	107
The St. Croix of charters and other public acts	108
Examination of various passages in American argument	111
Indian testimony discussed	113
Testimony of Messrs. Wright, Pagan, Morris, Hodges, Brown, and Frost	118
Conclusion	143
5. Mr. Sullivan's Remarks on Mr. Chipman's Supplemental Argument	149
Necessity of prolonged investigations and arguments	149
Scope of the "Remarks"	151
Objections to Alexander Grant	151
Extinction of the Grant	152
Charter of William and Mary, 1691, to Massachusetts Bay	152
Absence of mention of the St. Croix	152
Testimony of President Adams	153
Relinquishment of claim of Massachusetts to Nova Scotia	153
Report of Bowdoin, Brattle and Hubbard	154
Governor Hutchinson's report	155
Description of the boundary in the Charter of 1691	157
Exercise of jurisdiction by Massachusetts over Nova Scotia 1691-1703	159
River St. Croix never a charter boundary of Massachusetts province	160
Lack of mention of Alexander Grant	160
Grants to La Tour and D'Aulney	160
All Nova Scotia within Massachusetts Charter	161
Separation of Nova Scotia from Massachusetts	162
Evidence of the maps	164
Pople's map	165
Summary of points submitted	169
The Magaguadavic intended as the St. Croix	169
Evidence before the Peace Commissioners	171
Again, the question of maps	173
Mitchell's map	176
Jefferys' map	178
French maps	179
Question is, as to the St. Croix of Mitchell's map	179
Northwest angle of Nova Scotia	181
Determination of the St. Croix essential	183

The river and islands of De Monts	184
Wright's testimony	185
The Cobscook	195
The "viva voce" evidence	196
Alexander Hodges	196
Orders of Governor Bernard	200
Conduct of Mitchel in the survey	201
Claims of Massachusetts Bay	213
Agreement dispensing with particularizing latitude and longitude of source of the St. Croix	214
Annex to Mr. Sullivan's Remarks: Alexander Grant to La Tour	216
6. Mr. Chipman's Postscript to his Supplemental Argument	223
Report of Commissioners Bowdoin, Brattle, and Hubbard	223
Commissioners did not go to Passamaquoddy	224
Report of Governor Hutchinson, 1763	224
Property in soil of Nova Scotia not granted to Massachusetts in 1691	225
No proof of any "Compact" by which Massachusetts relinquished right to Nova Scotia	225
Any rights claimed by Massachusetts to Nova Scotia extinguished by Treaty of Ryswick	226
Consistency of British averments	227
Governor Hutchinson and the alleged compact of 1700 or 1703	227
Refuge in the question of maps	228
Narratives of Champlain and L'Escarbot	230
"L'Escarbot's" map	231
The ruins on St. Croix Island	232
The Cobscook and the St. Croix	232
The Schoodiac invariably claimed by British as boundary since 1772	232
Testimony of witnesses	234
Inconsistencies in claim to the Magaguadavic	234
Governor Bernard's instructions to John Mitchel	234
Testimony and conduct of Mitchel and his party	235
Testimony of British witnesses	236
Testimony of Mr. Curry	237
Testimony of Charles Morris, Junior	237
The so-called Morris "Report"	238
Mr. Wright, and St. Croix and Dudley Islands	239
Maps not geometrically correct	240
Geographical certainty	241
Geographical evidence as to the St. Croix	241
Peculiar marks and characteristics of the St. Croix	241
Coincidence of the maps with these marks and characteristics	242
(1) Champlain, 1613	242
(2) L'Escarbot, 1618	243
(3) Sir Wm. Alexander, 1624	243
1625	244
(4) Visscher, 1650	244
Van Keulen	245
(5) Senex, 1710	245
(6) Southack, 1716	245
(7) Southack's, 1717	246

(8) Anonymous, 1731	248
(9) Popple's, 1738	249
(10) Bellin, 1744	251
(11) 1744	252
(12) 1755	252
(13) D'Anville's, 1746	252
(14) Bowen, 1752	253
(15) Turner's, 1752	253
(16) French memorials, 1755	253
(17) French, 1755	254
(18) Mitchell's, 1755	254
(19) Mitchell's French edition, 1756	254
(20) Vaugondy, 1757	255
(21) Jefferys, 1776	255
(22) 1776	255
(23) 1777	255
(24) 1757	256
Demonstration of Schoodiac as true St. Croix	257
7. Mr. Sullivan's Observations on Mr. Chipman's Postscript to his Supplemental Argument	261
Restatement of positions of the American Agent	262
Claim to the Magaguadavic the real question	264
Intention of the Treaty controlling	264
Admissibility and force of evidence	265
Histories, public documents, and acts of State	265
The Etchemins and their river	266
The name St. Croix	267
The islands and the river	268
The History of the District of Maine	269
Claims at Paris, 1782	270
The Report of Governor Bowdoin and others	272
Nova Scotia once a part of Massachusetts Province	273
Question of the relinquishment	274
The northwest angle of Nova Scotia	275
The source of the St. Croix	276
Evidence of the maps	282
Maps before 1700	282
L'Escarbot's map	282
Old Dutch chart	283
Visscher's map	283
Map of John Senex	283
Maps after 1700, and before 1783	284
Southack's maps	284
Anonymous map, 1731	288
Popple's map	288
Map accompanying Quebec Proclamation	290
Bellin's maps	291
The Schoodiac Lakes	292
Map in American atlas, 1777	292
Conclusions deduced from the maps	292
Evidence before Peace Commissioners, 1782	293

Testimony of Mitchel and his party	294
Indian testimony before the Board	297
Uncertainty of Peace Commissioners as to the St. Croix	298
Governor Bernard's letter of 1765	299
Mitchel's survey under Bernard's instructions	302
Mitchell's map	302
The River Passamaquoddy and the Schoodiac	303
Governor Bernard's interest and motives	306
Map in the American atlas, 1775	308
Maps of Southack and Mitchell	309
Summary and conclusion	310
8. Mr. Chipman's Reply to Mr. Sullivan's Observations	315
Evidence of the maps	317
Popple's map	317
Southack's maps	319
Governor Bernard's letter and map	320
Northwest angle of Nova Scotia	320
The Alexander Grant	320
Source of the St. Croix	326
Northern and western boundary of Nova Scotia in 1782	327
Commissions of Governors	327
Western boundary of Nova Scotia in 1782	328
9. Mr. Sullivan's Remarks on Mr. Chipman's Reply to his Observations	333
Claims of the parties	333
Unessential contentions	334
Islands where De Monts wintered	335
The historic St. Croix	335
Inconsistencies in British arguments	336
The northward line of Alexander's Grant	336
Analogous question in Massachusetts Charter	337
And in the boundary between New Hampshire and Maine	338
The boundary of New England	338
The question of the north line and the angle	339
The names Passamaquoddy, Scootuck, St. Croix, Magaquadavie, and Cobscook	339
The St. Croix of the early French voyagers	340
Acts of State	341
The Alexander Grant, 1621	342
The Razilly Grant, 1632	342
The statement of the Paris Commissioners, 1750	343
The Bernard Grant and map, 1765	343
Act of Parliament, 1775	344
Schoodiac not identified with St. Croix by acts of State	344
Treaty of Peace and its just construction	344
Mitchell's map	344
Six characteristics identifying St. Croix with Magaguadavic	345
(1) The river next the St. John's	345
(2) A river emptying into the Bay on the east	346
(3) The south line will intersect Campo Bello Island	346
(4) The westerly situation of Passamaquoddy River	346
(5) The situation of the St. Croix's source	349

(6) The Eastern Charter—boundary of Massachusetts	349
Proofs adduced in favor of the Magaguadavic	351
The meaning of the Grants	352
Previous ideas recognized in Treaty of Peace	355
Treaty of Breda	355
Treaty of Ryswick	355
Letter to Lord Bellamont	356
The Magaguadavic the only reconciliation of the proofs	356
VIII. DELIBERATIONS ON THE AWARD	359
Offer of further proof	360
Alleged errors in general map	361
Questions discussed	362
Intention of the Treaty of Peace	362
The historical St. Croix	363
Course and source of the St. Croix	364
Fulfilment of the Treaty of Peace	367
Arrival at unanimous decision	367
Purport of decision	371
Mouth of the St. Croix	371
IX. THE AWARD	373
Text of the Declaration	373
American Agent's report	374
X. REPORT OF MR. BENSON	375
XI. EXPENSES OF THE COMMISSION	385
XII. THE RECORDS OF THE COMMISSION	393
Preparation of copies	397
Problems	398
The solution	405
Geographical variants	400
List of authorities	405

MAPS

FACING PAGE
VOLUME I

Mitchell, John. Map of the British and French Dominions in North America. 1755	1
Champlain, Samuel de. Carte géographique de la Nouvelle France. 1612	184
———. Isle de Sainte Croix. 1613	188
Wright, Thos. A Plan of the Coast from the West Passage of Passamiquodi Bay to the River St. John, Bay of Fundy. 1772	218
Bellin, N. Carte de l'Accadie. 1744	248
Bowen, Eman. A New and Accurate Map of Nova Scotia, Canada, etc. 1752	280
Anville, J. B. B. d'. Amérique Septentrionale. 1746	284
Morse, Jedidiah. American Universal Geography. Map of the District of Main. 1793	286
Vaugondy, Robert de. Partie de l'Amérique Septentrionale qui comprend la Nouvelle France ou le Canada. 1755	288
Senex, John. North America. 1710	290
Jefferys, Thos. A New and Correct Map of North America. 1777	382
———. A Map of the British Empire in North America. 1776	384
———. A New Map of Nova Scotia and Cape Breton Island, with the adjacent parts of New England and Canada. 1775	386
Lescarbot, Marc. Figure de la Terre Neuve, Grande Rivière de Canada et côtes de l'océan en la Nouvelle France. 1609	402

VOLUME II

Mitchell, John. Amérique Septentrionale, par le Dr. Mitchel. Traduit de l'Anglois. 1756	42
Popple, Henry. A Map of the British Empire in America. 1733	166
Champlain, Samuel de. Carte géographique de la Nouvelle France. 1613	242
Alexander, Sir William. Map of Nova Scotia. 1624	244
Keulen, Joannes van. Sea Coasts of Newfoundland, New France, Canada and Accadia. 1700 [?]	246
Anonymous. A Correct Map of the Coast of New England. 1731	248
Bellin, N. Carte de la partie orientale de la Nouvelle France ou du Canada. 1744	252
———. Carte réduite des costes orientales de l'Amérique Septentrionale. 1757	256
Jefferys, Thos. North America and the West Indies. 1775	308
Sproule, Geo., and Wright, Thos. Plan of the Rivers Scoodic and Maguadavic, and of Passamaquoddy Bay. 1796-98	372

EXTRACT FROM
A
MAP
of the
British & French Dominions
in
NORTH AMERICA,

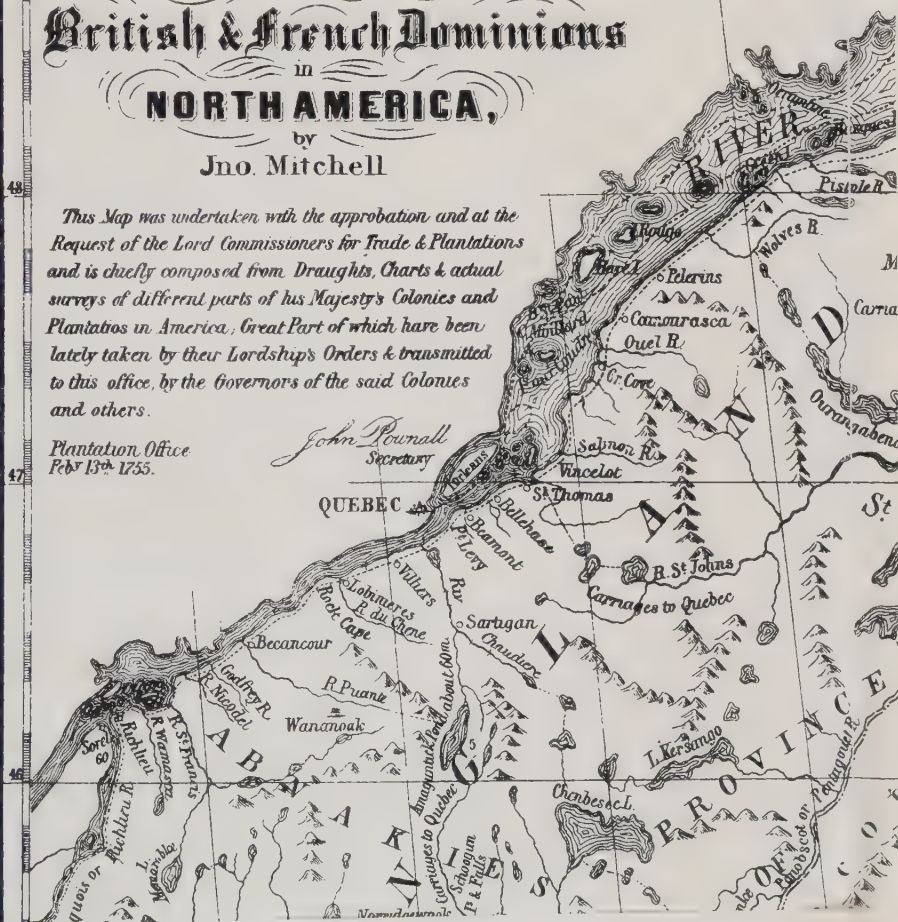
by
Jno. Mitchell

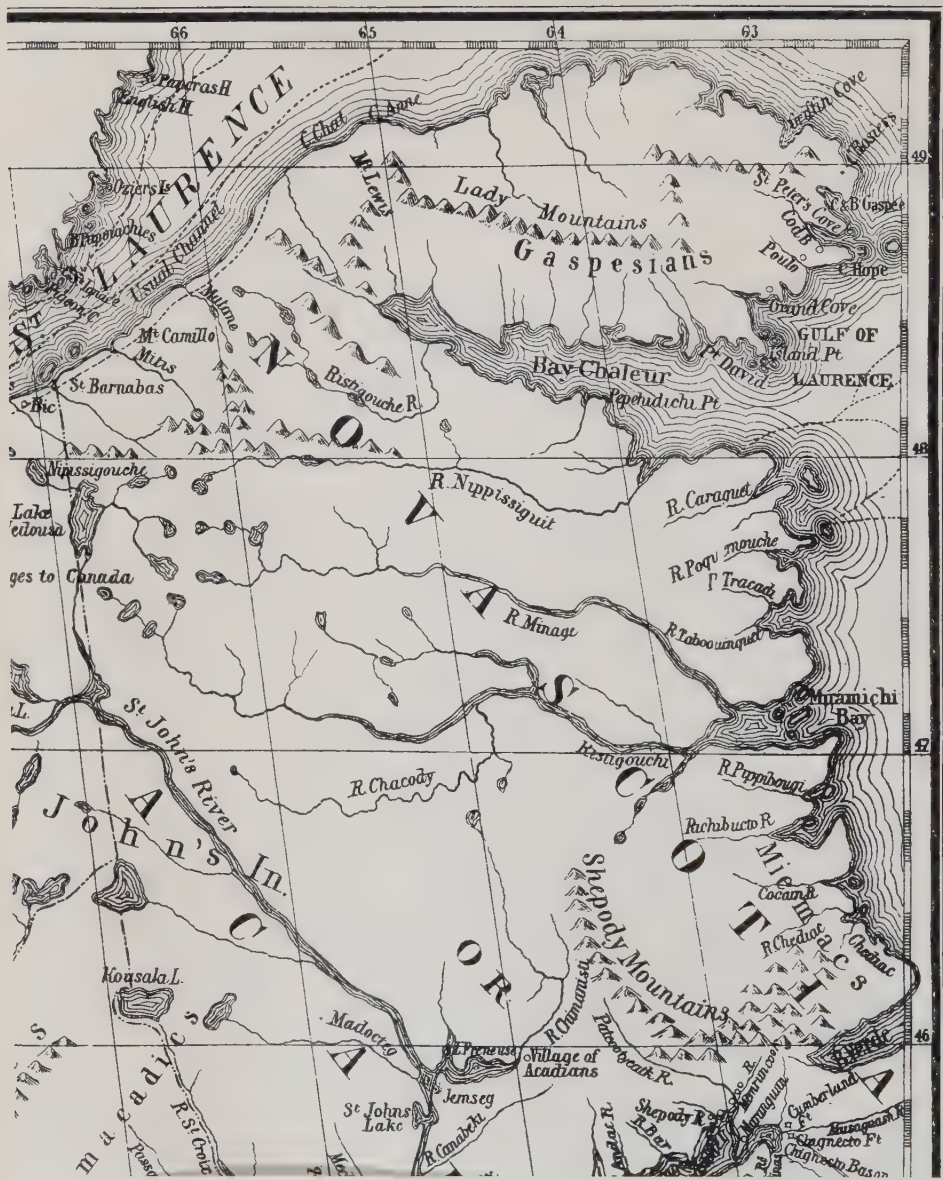
This Map was undertaken with the approbation and at the Request of the Lord Commissioners for Trade & Plantations and is chiefly composed from Draughts, Charts & actual surveys of different parts of his Majesty's Colonies and Plantations in America, Great Part of which have been lately taken by their Lordship's Orders & transmitted to this office, by the Governors of the said Colonies and others.

Plantation Office
Feb 13th 1755.

John Pownall
Secretary

QUEBEC





BOUNDARY ARBITRATION: DETERMINATION OF THE RIVER INTENDED BY THE NAME ST. CROIX

MIXED COMMISSION UNDER ARTICLE V OF THE TREATY
BETWEEN GREAT BRITAIN AND THE UNITED STATES
OF NOVEMBER 19, 1794: COMMONLY CALLED, IN
THE UNITED STATES, THE JAY TREATY

I. Treaty Stipulations

1. Definition of the Boundary: Article II, Definitive Treaty of Peace, concluded at Paris, September 3, 1783; ratified by the Continental Congress, January 14, 1784; proclaimed, January 14, 1784.

The article given below is, with the exception of a single change, a transcript of Article II of the provisional articles of peace between Great Britain and the United States, concluded at Paris, November 30, 1782. The single change was purely formal. Article I of the provisional peace, after reciting that his Britannic Majesty acknowledged the United States to be "free, sovereign and independent States," that he treated with them as such, and that he relinquished "all claims to the Government, propriety and territorial rights of the same," closed with these words: "and that all disputes which might arise in future on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared that the following are and shall be their boundaries, viz:" Then followed Article II, with the description of the boundary. In the definitive peace, the closing words of Article I were merely transferred to Article II, of which they form the introduction.

It was in the negotiation of the provisional articles that the conditions of peace were actually determined, and it was expressly stipulated that those articles should be inserted in and should constitute the treaty of peace to be formally concluded between the two countries after terms of peace between France and Great Britain should be agreed upon. The provisional articles were signed by Richard Oswald, as commissioner of his Britannic Majesty to treat of peace with the commissioners of the United States of America, and by John Adams, Benjamin Franklin, John Jay, and Henry Laurens, as commissioners of the United States to treat of peace with the commissioners of his Britannic Majesty. In the signing of the

definitive peace, David Hartley was substituted for Oswald. The signers on the part of the United States were Adams, Franklin, and Jay, Laurens having then left France.

ARTICLE II. And that all disputes which might arise in future, on the subject of the boundaries of the said United States may be prevented, it is hereby agreed and declared, that the

Boundaries following are, and shall be their boundaries, viz: From the northwest angle of Nova Scotia, viz. that angle which is formed by a line drawn due north from the source of Saint Croix River to the Highlands; along the said Highlands which divide those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean, to the north-westernmost head of Connecticut River; thence down along the middle of that river, to the forty-fifth degree of north latitude; from thence, by a line due west on said latitude, until it strikes the river Iroquois or Cataraquy; thence along the middle of said river into Lake Ontario, through the middle of said lake until it strikes the communication by water between that lake and Lake Erie; thence along the middle of said communication into Lake Erie, through the middle of said lake until it arrives at the water communication between that lake and Lake Huron; thence along the middle of said water communication into the Lake Huron; thence through the middle of said lake to the water communication between that lake and Lake Superior; thence through Lake Superior northward of the Isles Royal and Phelipeaux, to the Long Lake; thence through the middle of said Long Lake, and the water communication between it and the Lake of the Woods, to the said Lake of the Woods; thence through the said lake to the most north-western point thereof, and from thence on a due west course to the river Mississippi; thence by a line to be drawn along the middle of the said river Mississippi until it shall intersect the northernmost part of the thirty-first degree of north latitude. South, by a line to be drawn due east from the determination of the line last mentioned, in the latitude of thirty-one degrees north of the Equator, to the middle of the river Apalachicola or Catahouche; thence along the middle thereof to its junction with the Flint River; thence strait to the head of St. Mary's River; and thence down along the middle of St. Mary's River to the Atlantic Ocean. East, by a line to be drawn along the middle of the river St. Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid Highlands, which divide the rivers that fall into the Atlantic Ocean from those which fall into the river St. Lawrence; comprehending all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean; excepting such islands as now are, or heretofore have been, within the limits of the said province of Nova Scotia.

2. *Arbitration as to St. Croix River: Article V, Treaty of Amity, Commerce and Navigation, concluded at London, November 19, 1794; ratifications exchanged, October 28, 1795; proclaimed, February 29, 1796 (Jay Treaty).*

ARTICLE V. Whereas doubts have arisen what river was truly intended under the name of the river St. Croix, mentioned in the said treaty of peace, and forming a part of the boundary therein described; that question shall be referred to the final decision of commissioners to be appointed in the following manner, viz:

Mixed
Commission

One commissioner shall be named by His Majesty, and one by the President of the United States, by and with the advice and consent of the Senate thereof, and the said two commissioners shall agree on the choice of a third; or if they cannot so agree, they shall each propose one person, and of the two names so proposed, one shall be drawn by lot in the presence of the two original Commissioners. And the three Commissioners so appointed shall be sworn, impartially to examine and decide the said question, according to such evidence as shall respectively be laid before them on the part of the British Government and of the United States. The said Commissioners shall meet at Halifax, and shall have power to adjourn to such other place or places as they shall think fit. They shall have power to appoint a Secretary, and to employ such surveyors or other persons as they shall judge necessary. The said Commissioners shall, by a declaration, under their hands and seals, decide what river is the river St. Croix, intended by the treaty. The said declaration shall contain a description of the said river, and shall particularize the latitude and longitude of its mouth and of its source. Duplicates of this declaration and of the statements of their accounts, and of the journal of their proceedings, shall be delivered by them to the agent of His Majesty, and to the agent of the United States, who may be respectively appointed and authorized to manage the business on behalf of the respective Governments. And both parties agree to consider such decision as final and conclusive, so as that the same shall never thereafter be called into question, or made the subject of dispute or difference between them.

The treaty of November 19, 1794, from which the foregoing article is quoted, was signed on the part of Great Britain by Lord Grenville, and on the part of the United States by John Jay. By Article XXVIII it was agreed that the first ten articles should be permanent; but it was further agreed that, as it would be "expedient, in order the better to facilitate intercourse and obviate difficulties," that other articles which, "from want of time and other circumstances," could not then be "perfected," should be proposed and added to the treaty, the contracting parties would from time to time propose and treat of such articles. This stipulation was invoked in including the "explanatory article" given below.

3. Explanatory Article, concluded March 15, 1798, releasing the commissioners under Article V of the treaty of November 19, 1794, supra, from the obligation to particularize the latitude and longitude of the source of the St. Croix River. The ratification of the explanatory article was advised by the United States Senate, June 5, 1798, and the article was duly carried into effect.

Whereas by the twenty-eighth article of the treaty of amity, commerce, and navigation between His Britannick Majesty and the United States, signed at London on the nineteenth day of November, one thousand seven hundred and ninety-four, it was agreed that the contracting parties would, from time to time, readily treat of and concerning such further articles as might be proposed; that they would sincerely endeavour so to form such articles as that they might conduce to mutual convenience and tend to promote mutual satisfaction and friendship; and that such articles, after having been duly ratified, should be added to and make a part of that treaty: And whereas difficulties have arisen with respect to the execution of so much of the fifth article of the said treaty as requires that the Commissioners appointed under the same should in their description particularize the latitude and longitude of the source of the river which may be found to be the one truly intended in the treaty of peace between His Britannick Majesty and the United States, under the name of the river St. Croix, by reason whereof it is expedient that the said Commissioners should be released from the obligation of conforming to the provisions of the said article in this respect. The undersigned being respectively named by His Britannick Majesty and the United States of America their Plenipotentiaries for the purpose of treating of and concluding such articles as may be proper to be added to the said treaty, in conformity to the above-mentioned stipulation, and having communicated to each other their respective full powers, have agreed and concluded, and do hereby declare in the name of His Britannick Majesty and of the United States of America, that the Commissioners appointed under the fifth article of the above-mentioned treaty shall not be obliged to particularize, in their description, the latitude and longitude of the source of the river which may be found to be the one truly intended in the aforesaid treaty of peace under the name of the river St. Croix, but they shall be at liberty to describe the said river, in such other manner as they may judge expedient, which description shall be considered as a complete execution of the duty required of the said Commissioners in this respect by the article aforesaid. And to the end that no uncertainty may hereafter exist on this subject, it is further agreed, That as soon as may be after the decision of the said Commissioners, measures shall be concerted between the Government of the United States and His Britannick Majesty's Governors or Lieutenant Governors in America, in order to erect and keep in repair a suitable monument at the place ascertained and described to be the source

of the said river St. Croix, which measures shall immediately thereupon, and as often afterwards as may be requisite, be duly executed on both sides with punctuality and good faith.

This explanatory article, when the same shall have been ratified by His Majesty and by the President of the United States, by and with the advice and consent of their Senate, and the respective ratifications mutually exchanged, shall be added to and make a part of the treaty of amity, commerce, and navigation between His Majesty and the United States, signed at London on the nineteenth day of November, one thousand seven hundred and ninety-four, and shall be permanently binding upon His Majesty and the United States.

In witness whereof we, the said undersigned Plenipotentiaries of His Britannick Majesty and the United States of America, have signed this present article, and have caused to be affixed thereto the seal of our arms.

Done at London this fifteenth day of March, one thousand seven hundred and ninety-eight.

[SEAL]
[SEAL]

GRENVILLE
RUFUS KING

II. Dispute as to St. Croix River

In spite of the good intentions of the framers of the treaty of peace, and their avowed effort to leave no room for future controversy, the definition of the boundaries of the United States far from preventing disputes, was exceedingly fruitful of them. When the description was drawn up, most of the country through which the lines were to run had never been surveyed, and the maps of it were necessarily inaccurate. Parts of the boundary were declared to be "too imperfectly described to be susceptible of execution."¹ But, apart from the uncertainty resulting from the absence of accurate topographical knowledge, the possibilities of dispute were enlarged by the fact that the negotiators of the treaty made no official record of their intentions. Though the same map was used by both sides in the negotiation, on no copy of it were the lines intended by the negotiators jointly and formally entered, and no map was officially attached to the treaty.

Uncertainty of the descriptions

Almost immediately after the ratification of the treaty of peace, disputes as to the boundary began to arise. The first grew out of the designation of the River St. Croix as a part of the line.

By recurring to the language of the treaty, it will be seen that the northern boundary of the United States begins, in its westward course, at "the northwest angle of Nova

Importance of the River St. Croix

¹ Message of President Jefferson to Congress, October 17, 1803, Am. State Papers, For. Rel. I. 62.

Scotia," which is described as "that angle which is formed by a line drawn due north from the source of Saint Croix River to the Highlands"; and that the eastern boundary is a line "to be drawn along the middle of the River St. Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid Highlands," etc. Thus the St. Croix possesses a double importance. It not only forms a part of the eastern boundary, but it also serves as a basis for the determination of the northern boundary.

On Mitchell's map of 1755, which was used by the negotiators of the treaty of peace, and of which a copy is inserted at the beginning of this narrative, the River St. Croix appears as a stream of considerable volume, having its source in a lake called Kousaki and its mouth at the eastern head of what is now known as Passamaquoddy Bay, though on the map the greater part of the bay has no separate designation and appears merely as a part of the Bay of Fundy. To the westward on the same map is another stream called the "Passamacadie" (Passamaquoddy), emptying into a small bay or estuary of the same name. But, while Mitchell's map was correct in representing two streams of some magnitude as falling into the body of water commonly known as Passamaquoddy Bay, it did not give their true courses or positions, nor was there in the region any river then commonly known as the St. Croix. This name originated with the early French explorers, from whose charts it was transferred to later maps, on which it was given first to one stream and then to another; and in all these maps, including that of Mitchell, the topography of the region was inaccurate.

The fact that a surveyor, named John Mitchel, who, although others have indiscriminately written his name "Mitchell" and "Mitchel," himself wrote it "Mitchel," played, as will hereafter be seen, a conspicuous part in the present arbitration, renders a biographical note at this point desirable. Burrage, in one of his writings,¹ cites Kilby, a local historian,² as authority for the conjecture that the cartographer and the surveyor were the same person; but the surmise is erroneous. Kilby, having before him, as he said, "an old book of twenty odd sheets of unruled paper fastened together," constituting a field book of surveys made, by order of Governor Bernard, by John

¹ Burrage, *Maine in the Northeastern Boundary Controversy*, 12. The author of this publication was Henry S. Burrage, D.D., State Historian of Maine.

² *Eastport and Passamaquoddy. A Collection of Historical and Biographical Sketches*, compiled by William Henry Kilby, with Notes and Additions, Eastport, Maine: Edward E. Shead & Company, 1888, 505 pp.

"Mitchell," surveyor, with Israel Jones as his deputy, in 1764, stated that at the end of the book there was a certificate by "Mitchell," in which he described himself as an inhabitant of Chester, in the State of New Hampshire. Kilby repeatedly speaks of the surveyor as "Captain Mitchell," and, after stating that Governor Bernard gave to "Mitchell" for his guidance a section of the larger map of Captain Southack, says: "Several years before Mitchell was employed on this survey, there was published a large map of the British and French possessions in North America, bearing the name of John Mitchell; and, though it is not found explicitly stated anywhere, it is presumed that it is the same John Mitchell in both cases."¹ Had the surveyor's spelling of his own name been heeded, the confusion of him with the cartographer would not have been so readily made. In the Collections of the New Brunswick Historical Society, No. 5, 1904, pp. 175-188, there is a paper entitled "John Mitchel's Diary and Field Book of his survey of Passamaquoddy in 1764," by W. F. Ganong, with editorial notes and comments; and in this paper not only is the diary for the first time printed in full, but it is also, as Ganong says, "given precisely as written, excepting only for certain obscurities in the writing or injuries to the paper." The name of the author repeatedly occurs in it, and it is invariably "Mitchel." The same form usually appears in documents purporting to have been either prepared or signed by him. Ganong (p. 179) observes: "Mitchel was no doubt an expert surveyor, but, as his diary shows, he was a very illiterate man. He spells his own name with but one l, and this spelling I have adopted, although I suspect it should be spelled in the usual way." Ganong was well advised in not translating this suspicion into certainty. The principal object of a name is personal identification; and the name of an individual is, in law as well as in fact, that which he himself uses and by which he is known. There may be a vehement suspicion that the names "Pinckney" and "Pinkney" were originally spelled the same way; and the same thing may, for instance, be said of "Wistar" and "Wister," of "Clark" and "Clarke," of "Park" and "Parke," and perhaps even of "Smythe" and "Smyth," and "Smith"; but we should introduce infinite and resentful confusion, if we should therefore assume to impose on the bearer of one of those similar yet distinctive forms a name different from that which he contentedly or perchance proudly wears. Mitchel, tried by the test of conventionality in spelling, may have been "very illiterate"; but, even if this test were infallible, the failure to meet it would not justify the denial to him of the right to spell his name with one "l."

¹ Id. 91.

"Mitchel" is, in reality, a well known form, by no means associated with illiteracy. Our surveyor, who was a local magistrate, and apparently also an officer in the militia, evidently held in the community in which he lived an influential position; and the respectability of his character is indicated by the responsible tasks with which he was entrusted, such as the making of the survey now in question. A younger man than the cartographer, he continued his activities long after the latter had passed away.

John Mitchell, the maker of the famous map, was born and educated in England, where he was graduated as a doctor of medicine. About 1700 he came to America, settling in Virginia, and for nearly half a century industriously conducted studies in history, in medicine, and in botany, writing on all these subjects and becoming especially distinguished for his botanical collections and publications. It does not appear that he ever went north of Philadelphia. He returned to England in 1746—some say in 1748; and his subsequent works and other testimony indicate that he never revisited America. His map of the English and French dominions in North America, the first edition of which was published in 1755, was prepared at the request of the Lords Commissioners for Trade and Plantations. This appears by the certificate of John Pownall, secretary to the board, dated at Plantation Office, Feb. 13, 1755, and printed on the map itself, stating that the map was "chiefly composed from draughts, charts, and actual surveys," a great part of which had been "lately taken by their lordships' orders and transmitted to this office" by the governors of the Colonies and others. Dr. Mitchell died in 1768.¹

Of the two principal streams that fall into Passamaquoddy Bay, that to the east was known in 1782, as it is still known, by the Indian name of Magaguadavic; that to the west as the Schoodiac, Scoudiac, or Schoodic. These are the only streams of any magnitude that fall into the Bay of Fundy west of the River St. John. The Magaguadavic, or eastern river, like the St. Croix of Mitchell's map, pursues from its mouth a course generally west of north, but, unlike the latter, it divides near its source into two branches, each of which has its head in a lake. The Schoodiac, wholly unlike the Passamacadie of Mitchell, after pursuing

¹ Lyman Carrier, Dr. John Mitchell, Naturalist, Cartographer, and Historian, Annual Report of the American Historical Association, 1918, I. 201, 206; A Book of Old Maps, compiled and edited by Emerson D. Fite and Archibald Freeman, Harvard University Press, Cambridge, 1926, 181-4, 292-3; Noteworthy Maps with Charts, Views and Atlases, Accessions 1925-26, compiled by Lawrence Martin, Chief, Division of Maps, Library of Congress. See, also, Dictionary of National Biography, 1894; New International Encyclopaedia, 1918; Allibone's Dictionary of English Literature and British and American Authors.

for some distance from its mouth a crooked course, generally west-northwest, divides into two branches, one of which extends to the north, under the name of the Chiputneticook, and the other in a course generally somewhat west of south to a tangled chain of waters called the Schoodiatic Lakes. The United States claimed the Magaguadavic as the St. Croix of the treaty, and the head of its western lake as its source. Great Britain claimed the Schoodiatic as the true St. Croix, and the most remote waters of the lakes at the head of its western branch as its source. Thus, while the mouths of the Magaguadavic and Schoodiatic lie about nine miles apart, the distance between lines drawn due north from their alleged sources was quite fifty miles, and the area of the territory involved was from seven thousand to eight thousand square miles.

Immediately after the ratification of the treaty of peace the authorities of Nova Scotia, treating the River Schoodiatic as the St. Croix of the treaty, made grants of land on its eastern bank to loyalist refugees who formed there the settlement of St. Andrews. This proceeding attracted the attention of Congress and of the authorities of Massachusetts, and the latter appointed a commission of three persons—two of whom were Generals Lincoln and Knox—to make an investigation. These commissioners, besides visiting Passamaquoddy Bay, obtained statements from John Adams and John Jay, and also from John Mitchel, then a resident of Chester, New Hampshire, who was employed by Governor Bernard, of Massachusetts, in 1764, to ascertain the river known under the name of the St. Croix; and they reported that, although the map used by the negotiators was defective, the Magaguadavic was the river intended by the treaty. Adams in his statement took the ground that, as the River St. Croix on Mitchell's map was the river nearest to the St. John, the Magaguadavic, as being nearer to the St. John than the Schoodiatic, should be accepted as the boundary. The uncertainties of the situation and the views of the British authorities and surveyors were very fairly stated in a letter of Gen. Rufus Putnam to a committee of the Massachusetts legislature of December 27, 1784.¹

As it was impossible to determine with absolute certainty what river was intended in the treaty under the name of the St. Croix, Congress, on the recommendation of Jay, who was then Secretary of Foreign Affairs, resolved that the minister of the United States at London should be instructed to bring the question to the attention of the British Govern-

Action of Nova Scotia and Massachusetts
Proposals of the United States

¹ Am. State Papers, For. Rel. I. 92.

ment, and, if an adjustment by negotiation could not be effected, to propose a settlement by commissioners. Instructions were accordingly sent, but nothing could at the time be accomplished; and on the 9th and 18th of February, 1790, during the second session of the first Congress under the Constitution, Washington submitted the matter to the consideration of the Senate with an expression of his opinion that all questions between the United States and other nations should be speedily and amicably settled. On the 24th of March the Senate advised that effectual measures should be taken to settle all disputes in regard to the line, and that "it would be proper to cause a representation of the case to be made to the court of Great Britain; and if the said disputes cannot be otherwise amicably adjusted, to propose that Commissioners be appointed to hear and finally decide those disputes, in the manner pointed out in the report of the late Secretary of the United States for the Department of Foreign Affairs, of the 21st of April, 1785."¹

The question still remained unsettled when, in 1794, Jay, who was then Chief Justice of the United States, was sent to London as minister plenipotentiary to negotiate for the general adjustment of differences. On November 19, 1794, he concluded a treaty, the fifth article of which, relating to the St. Croix River, has already been quoted.² By this article provision was made for the appointment of three commissioners finally to decide "what river was truly intended" under that name. On the day of the signing of the treaty, Jay, in a letter to Edmund Randolph, then Secretary of State, observed that in the discussions before the commissioners the old French claims might be revived; that the United States must adhere to Mitchell's map, and that the Vice President, John Adams, perfectly understood the business.³

III. Organization of Mixed Commission

The first appointment under Article V took place on March 5, 1796, when George III appointed Thomas Barclay, of Annapolis, Nova Scotia, as commissioner on the part of Great Britain. Barclay was born in the city of New York, and, according to a family tradition, studied law in the office of John Jay. He had just been admitted to the bar when the revolu-

¹ For the report of Jay, April 21, 1785, see *Am. State Papers*, For. Rel. I. 94; for the messages of Feb. 9 and 18, 1790, see *id.*, 90, 99. The Senate's resolution of March 24, 1790, is printed in vol. 1 of Duff Green's publication (1828) of the *Journal of the Executive Proceedings of the Senate*. There are a few verbal but unimportant variances between the text there given and the manuscript copy of the resolution in the Department of State.

² *Supra*, 3.

³ *Am. State Papers*, For. Rel. I. 503.

tionary war broke out; and soon afterwards, because of conditions in the city, he removed to Ulster County, in the State of New York. His sympathies were royalist, and in 1776, after the battle of Long Island and the pressing back of the American forces, he went southward and joined the British army as a volunteer. For the next seven years he saw active service in New York, New Jersey, Connecticut, Virginia, and the Carolinas, rising to the rank of colonel. At the close of the war he, with many other proscribed loyalists, sought a home in Nova Scotia, where he practiced his profession and became a member and later the speaker of the provincial assembly. His appointment as a commissioner to settle the dispute as to the St. Croix River was the beginning of a long career as the representative of his government in various capacities in the United States or in relation to American affairs.¹

Barclay's commission under Article V was as follows:²

GEORGE R.

George the third by the Grace of God King of Great Brittain, France, & Ireland, Defender of the Faith, Duke of Brunswick & Lunenburgh, Arch Treasurer and Prince Elector of the Holy Roman Empire &c&c. To all whom these presents shall come. Greeting—Wheras by the Fifth Article of the Treaty of Amity, Commerce and Navigation concluded at London on the Nineteenth day of November in the year of our Lord 1794. between Us and our good Friends the United States of America it was agreed that the final decision of the Doubts which have arisen respecting the River that was truly intended under the name of the River St. Croix to form a part of the boundary line described in the definitive Treaty of Peace Concluded between Us and our Said Good Friends at Paris on the third Day of September in the Year of our Lord 1783 should be refered to the Commissioners who were to be appointed in the manner specified in the said Article and were to proceed to the final decision of the said Question in the manner also specified in the said Article. Now Know Ye that we reposing special trust and confidence in the Wisdom Diligence and integrity of our Trusty and well beloved Thomas Barclay Esquire have nominated constituted and appointed and by these presents do nominate, constitute and appoint him, Our true certain & undoubted Commissioner to meet confer, decide, and conclude with

¹ Rives, *Selections from the Correspondence of Thomas Barclay*, New York, 1894. "Barclay's report on the boundary [under Art. V] had hardly reached the Foreign Office when he was appointed British Consul-General for the Eastern States of America in the room of Sir John Temple, deceased." (Id. 95.) He held this post from 1799 to 1802, and afterwards served as British commissioner in the series of arbitrations relating to the Northeastern Boundary.

² The text here follows the copy in the Department of State; but a comparison of this text with the photograph of a passage from the text of Barclay's instructions (*Burrage, Maine in the Northeastern Boundary Controversy*, 42), justifies the presumption that Barclay's original commission was not characterized by the informalities found in the copy.

any Commissioner furnished with Sufficient Powers on the part of our said Good Friends the United States of America and with a Third Commissioner who shall be appointed in the manner prescribed in the Said Article, and to perform and execute all such matters and things as may be expedient and necessary for duly carrying on and compleating the examination and Decission of the doubts herein before mentioned and for the final settlement thereof in the manner provided in the said Treaty. We engaging and promising on our Royal Word, that we will accept and confirm all such Acts, Matters & things as shall in the premises be duly transacted & Concluded by the said Thomas Barclay Esqr. as Acts, matters and Things transacted and Concluded by our Commissioners appointed in that behalf in pursuance of the fifth Article of the Treaty herein before mentioned, and that we will give and cause to be given full force and effect to such final decission in the premises as by our said Commissioner together with the other two Commissioners above mentioned, or by the major part of the said Three Commissioners shall duly be made according to the Provisions of the said Treaty.

In testimony and Confirmation of all which we have caused our Great Seal of Great Britain to be affixed to these presents signed with our Royal Hand. Given at our Palace at S^t James this fifth day of March in the Year of our Lord One Thousand Seven Hundred & Ninety Six and in the Thirty Sixth Year of Our Reign.

The President on April 1, 1796, named as commissioner on the part of the United States, General Henry Knox, of Massachusetts; but

Appointment of
United States
Commissioner

General Knox declined to serve on the ground, among others, that he had a personal interest in the result of the controversy. The President then, on the 21st

of May, appointed David Howell, of Providence, R. I. Born at Morristown, N. J., January 1, 1747, Howell was graduated in 1766 at the College of New Jersey, later Princeton College, where he had as a fellow-student James Manning; and soon afterwards, when Manning became president of Brown University, at Providence, Howell went with him and permanently settled in Rhode Island. After serving for a time as assistant to Manning, and as a tutor, teaching, it is said, French, German, and Hebrew, he became in 1769 professor of mathematics and natural philosophy. He was a fellow of the university from 1773 to 1824, was secretary of the corporation from 1780 to 1806; acted as university president *ad interim* from 1791 to 1792; and from 1790 to 1824 was professor of jurisprudence, although it is said that he did not hold classes in that subject. He received the degree of LL.D. from Brown in 1793. Meanwhile, after 1779, he actively practiced law and held various public offices. From 1782 to 1785 he was a delegate to the Federal Congress, from 1786 to 1787

he was an associate justice of the supreme court of Rhode Island, and in 1789 was attorney-general of the State. In 1812 he was appointed United States judge for the district of Rhode Island, and he held this post until his death, July 30, 1824.¹ "Judge Howell," says Professor Goddard, his eulogist, "was endowed with extraordinary talents, and he superadded to his endowments extensive and accurate learning. As an able jurist, he established for himself a solid reputation. He was, however, yet more distinguished as a keen and brilliant wit, and as a scholar extensively acquainted, not only with the ancient, but with several of the modern languages. As a pungent and effective public writer he was almost unrivalled; and in conversation, whatever chanced to be the theme, whether politics or law, literature or theology, grammar or criticism, a Greek tragedy or a difficult problem in mathematics, Judge Howell was never found wanting. Upon all occasions which made any demands upon him he gave the most convincing evidence of the vigor of his powers, and of the variety and extent of his erudition."

There was issued to Howell the following commission:

GEORGE WASHINGTON, President of the United States of America
To all who shall see these presents. Greeting

WHEREAS Doubts have arisen what River was truly intended under the name of The River Saint Croix mentioned in the Treaty of Peace between the United States of America and His Britannic Majesty, and forming a part of the Boundary therein described. AND WHEREAS in the fifth article of the Treaty of Amity, Commerce, and Navigation between the said United States and His said Majesty, it is agreed to refer that Question to the final decision of Commissioners one of whom to be appointed by The President of the United States, by and with the advice and consent of the Senate thereof.

NOW KNOW YE—That reposing special trust and confidence in the integrity and ability of David Howel of Rhode-Island, I have nominated and by and with the advice and consent of the Senate appointed the said David Howel a Commissioner, with full power to meet a Commissioner appointed by His Britannic Majesty and with him to agree or otherwise determine on the appointment of a third Commissioner, in the manner prescribed in the said fifth Article. And thereupon, with those other Commissioners, being duly sworn, to proceed to decide the said question, and exactly to perform all the duties enjoined and necessary to be done, to carry the said fifth Article into compleat execution.

IN TESTIMONY WHEREOF I have caused these Letters to be made patent, and the Seal of The United States to be hereunto affixed.

¹ Appleton, *Cyclopædia of American Biography*, 1887; National *Cyclopædia of American Biography*, 1900; Lamb, *Biographical Dictionary of the United States*, 1901.

Given under my hand at the City of Philadelphia this twenty first day of May in the Year of our Lord, One thousand seven hundred and ninety six; and of the Independence of the United States of America: the twentieth.

GEO. WASHINGTON

[L. S.]

By the President of The United States

TIMOTHY PICKERING

Secretary of State

In acknowledging the receipt of this commission, Mr. Howell said:

PROVIDENCE, *June 7th 1796.*

SIR: Your Letters of the 27th & 28th Ult. I had the Honor of receiving Yesterday under a Cover enclosing also the Commission, the Copy of your Letter to M^r Liston & the Estimates you mention.

Will you be so kind as to express to the President that I am duly sensible of the Honor conferred on me in this high betrustment—that I am not unapprehensive lest the Interests of the United States may suffer in my Hands: but from a deference to the opinion of others perhaps too partial to me I shall hasten to execute the Trust in the best manner I can.

I have to thank you for the very obliging manner in which you have communicated this Business to me & for the arrangements made for inducing an interview with M^r Barclay—I have written a Letter to that Gentleman by this day's Post—a Copy of which is enclosed.

I learn with satisfaction that Judge Sullivan (my very particular friend) is to manage the Claim of the United States as their agent. M^r Webber the Philosophy-professor at Cambridge is also of my acquaintance & a Gentleman of singular Merit—I shall profit by all the suggestions in your Letter & assure myself of frequent & particular Instructions from your Department.

I am, [etc.]

DAVID HOWELL

Hon. TIMOTHY PICKERING, }
Secretary of State,
Philadelphia.

It will have been observed that Mr. Howell, in the foregoing letter, refers to steps that had been taken to bring about a meeting between

Preliminary
 meeting of two
 Commissioners

himself and Mr. Barclay. In May 1796, Mr. Barclay being in New York on private business, Timothy Pickering, who was then Secretary of State, suggested

that it would be well for him to meet Mr. Howell, the American commissioner, with a view to choose a third commissioner and a secretary, as well as a man of science to ascertain with precision the latitude and longitude of the mouth and the source of the St. Croix. Though the treaty indicated that the first meeting of the commis-

sioners in the execution of their official functions should be at Halifax, Mr. Pickering did not consider this indispensable. Mr. Barclay, while withholding his own opinion on the question, found himself precluded by his instructions from acting officially until he had met the American commissioner at Halifax, but he consented to hold with Mr. Howell a private interview, in which they might freely though informally discuss their future proceedings and come to some determination respecting the persons mentioned by Mr. Pickering. This conference took place at Boston on the 27th of June, 1796. Several persons were named for third commissioner, and among those suggested by Mr. Howell was Egbert Benson, of New York, who was Mr. Barclay's cousin of the half blood, his father having been a half-brother of Barclay's mother. No choice, however, was made, and, in the expectation that it would be necessary to resort to lot, it was agreed that each side should name "three able and respectable characters," from the list of whom the opposite party should strike the names of two, and that the two remaining names should be put into a box and one drawn out for the third commissioner.¹

Meanwhile each government had appointed an agent to represent it before the commissioners. On the part of the United States the agent chosen was James Sullivan, a distinguished citizen of Massachusetts, and a native of the District of Maine, of which he was the historian.² Appointment of
American Agent A lawyer by profession, Mr. Sullivan held numerous posts in the public service, being at divers times a member of the general court of Massachusetts, a member of the committee of public safety, a judge of the supreme judicial court, a member of Congress, and governor of his native commonwealth. He was also president of the Historical Society of Massachusetts. At the time of his appointment as agent of the United States before the St. Croix Commission he was attorney-general of Massachusetts; and that he was then at the height of his powers may be inferred from the statement of Horace Binney, in his delightful and masterly *Leaders of the Old Bar of Philadelphia*, that, while a student at Harvard, he enjoyed witnessing, in the Supreme Court of Massachusetts, "an exhibition of intellectual gladiature of the brightest kind," between Theophilus Parsons, as counsel for one Claflin, indicted of blasphemy under a Massachusetts statute, and James Sullivan, the attorney-general of the State.

Mr. Sullivan's commission, bearing date May 21, 1796, was as follows:

¹ Rives, *Correspondence of Thomas Barclay*, 48-51.

² Sullivan, *History of the District of Maine*, Boston, 1795.

GEORGE WASHINGTON, President of The United-States of America
To all who shall see these Presents, Greeting

WHEREAS Doubts have arisen what river was truly intended under the name of the river Saint Croix mentioned in the treaty of peace between the United States of America and His Britannic Majesty and forming a part of the boundary therein described. AND WHEREAS in the fifth article of the treaty of amity, commerce and navigation between the said United States and His Britannic Majesty it is agreed to refer that Question to the final decision of Commissioners to be appointed, as in the said fifth article is directed. AND WHEREAS the same article contemplates, and the interests of the respective governments require the appointment of Agents to manage the business in their behalf respectively.

NOW KNOW YE That reposing special trust and confidence in the ability diligence and integrity of James Sullivan of Massachusetts, I have nominated and by and with the advice and consent of the Senate, appointed the said James Sullivan the Agent of the United States to manage the business aforesaid in their behalf agreeably to the said fifth article, and to such instructions as shall be given him concerning the same.

IN TESTIMONY WHEREOF I have caused these Letters to be made patent, and the Seal of the United-States to be hereunto affixed.

Given under my hand at the City of Philadelphia this twenty-first day of May in the year of our Lord one thousand, seven hundred and ninety six, and of the Independence of the United States of America the twentieth.

[SEAL]

G. WASHINGTON

By The President

TIMOTHY PICKERING

Secretary of State

As regarded the duties of the agent under the foregoing commission, Mr. Pickering, himself a citizen of Massachusetts, gave, as Secretary of State of the United States, the following instructions:

Your researches as the historian of the District of Maine, your reputation as a lawyer, and your official employment as the attorney-general of Massachusetts, the State directly and most materially interested in the event, have designated you as the agent of the United States to manage their claim of boundary where their territory joins that of His Britannic Majesty, in his province of New Brunswick, formerly a part of his province of Nova Scotia. You are apprised that the question to be examined and decided is stated in the fifth article of the treaty of amity, commerce, and navigation between the United States and His Britannic Majesty. The quantity of land the title of which depends on this decision is an object so interesting as to demand an accurate and thorough investigation of the claims of the two nations. It is supposed that you are already possessed of important documents concerning them; but it is desirable that you should diligently inquire and search for

any others which public records or other repositories, public or private, may have preserved. The pending decision is to be *final*. Great industry, therefore, will be necessary to collect, and much diligence and ability required to arrange and enforce, the evidence in support of the claim of the United States. Besides written documents, it is possible that living witnesses, if carefully sought for, may yet be found whose testimony may throw much light on, if not positively establish, our claim. To obtain these, if they exist, as well as all written documents, the President relies on your diligent research and inquiry; and in the application of them to support the interests of the United States he assures himself of the utmost exertion of your ability.¹

On receiving his commission and instructions, Mr. Sullivan addressed to the Secretary of State the following letter:

BOSTON, 5th June 1796.

SIR: I had last evening the honor of receiving yours of the 31st ult^o. inclosing a commission of the President, proposed instructions, and an estimate of the expenses in settling the Northern boundary of the United States, according to the 5th article in the Treaty with his britannic Majesty. I am much gratified in having the honor to be called upon by the President, and shall at all times be ready to exert myself for the advancement of the national honor and interest.

I observe in the estimate of expenses on the business, a calculation for pack horses, &c, but am of opinion that nothing of that kind can accrue. The Country there, does not admit of traveling in that manner; a carriage by water being the only practicable mode. Perhaps a Hingham packet or a small vessel, with Boats to go up the river may be necessary; but this will be conducted by the Commissioners.

I trouble you with this letter merely on this account: The State of Massachusetts have a particular interest in the settlement of the Northern boundary. I have not the Treaty now within my reach, but the commission seems to be for the purpose of determining which is the river Saint Croix, and it does no doubt adopt the mode of expression in the Treaty. But there is a considerable Town on Saint Andrews Point on the western side of what we call the Saint Croix. The English claim to the Schooduck; a river west of this settlement. If the latter is decided to be the River, it will deprive Massachusetts State of a valuable territory. If the former, then it brings the above-mentioned settlement, perhaps against the will of the Inhabitants, within the United States. The power of a compromise might be of some consequence here; and I therefore take the freedom to suggest the idea—

As Massachusetts has a Territorial interest in this business, I take the liberty to suggest the idea of the agent of the United States informing the Legislature of that State of his appointment, and requesting that Government to furnish him with any evidence

¹ Amory, Life of James Sullivan, I. 307, 308.

on the subject which is within its power; but this I shall not do without the direction, or permission of the Executive of the United States. Should anything of that kind be thought proper, it may be necessary to have a communication upon it by the return of the mail, because the Session now in being may be very short, and the Commissioners may meet before another.

The line is to run North from the head of the Saint Croix, to the british Dominions. The Schooduck takes its rise so far to the westward, that a line drawn from the head of it, will leave to the east, a large tract of territory sold by the State of Massachusetts; but if the Saint Andrews People chuse to continue to be British subjects, if there could be a compromise to leave them on the British side of the line, and then to cross from the Schooduck to the Magadawick and go up that river to its head a settlement might be effected with facility.

I am [etc.]

JA SULLIVAN

Hon^{ble}. Mr PICKERING,
Secretary of State in the United States.

The suggestion of aid evidently did not pass unheeded. "Two of the council, two of the senate, and one of the most eminent of the law counsel in the State of Massachusetts," says Barclay, were "assigned to assist him [Mr. Sullivan] in collecting documents and evidence, and in preparing a case and arguments on this important question."¹ Amory, Sullivan's biographer, says that "Colonel Pickering . . . procured for Sullivan many valuable books, and among others, after sending for them without success to Europe, borrowed from the library of Jefferson copies of Champlain and L'Escarbot."²

The agent of Great Britain was Ward Chipman, who also was a native of Massachusetts. Like Barclay, the British commissioner, he had espoused the royalist cause in the Revolution, Appointment of British Agent he had served in the British army, and at the close of the war had sought refuge in Nova Scotia, taking up his residence in St. John, then in Nova Scotia, but which was later to be included in New Brunswick. At the time of his appointment as British agent before the St. Croix Commission he was solicitor-general of New Brunswick, of which province he was afterwards chief justice and president.³

Chipman's commission, which bore date May 6, 1796, was as follows:

¹ Rives, *Correspondence of Thomas Barclay*, 67.

² Amory, *Life of Sullivan*, I. 322.

³ Burrage, "St. Croix Commission," paper read before the Maine Historical Society, February 6, 1895; Burrage, *Maine in the Northeastern Boundary Controversy*, printed by the State (1919), 44. For further details as to Chipman, see the appointment of Winslow as secretary, *infra*, 30-2.

[SEAL] By His Excellency—Thomas Carleton Esquire,
 Lieutenant Governor and Commander in Chief
 THO^s. CARLETON of the province of New-Brunswick &c. &c. &c.
 To WARD CHIPMAN Esquire, Greeting.

WHEREAS I am authorized and directed by command of His Majesty to appoint a fit person well acquainted with the nature of the disputes that have arisen respecting the Boundary referred to by the fifth article of the treaty of amity commerce and navigation concluded with the United States of America to act under my direction as His Majesty's Agent in preparing and bringing forward the evidence to be lay'd before the Commissioners agreeably to the said article.

Reposing therefore full trust and confidence in your discretion zeal and ability faithfully to execute this important trust,

I have thought fit to appoint you the said Ward Chipman, and I do hereby appoint you His Majesty's Agent for the purposes above-mentioned, with full power and authority to have hold exercise and enjoy all the rights and privileges to the said agency appertaining, or which ought to appertain thereto, or may be requisite for the enabling you the better to execute and discharge the duties of the Office to which you are hereby appointed.

Given under my Hand and Seal at Fredericton the sixth day of May in the year of our Lord one thousand seven hundred and ninety-six, and in the thirty sixth year of His Majesty's reign.

By His Excellency's Command.

JON ODELL

Barclay, in a letter to Lord Grenville, of August 30, 1796, says: "I have industriously exerted myself since I had the honor of receiving his Majesty's Commission in procuring for the Consideration of Mr. Chipman His Majesty's Agent such papers proofs and documents as could throw light upon the subject in controversy, but I find his zeal and industry in the fulfillment of the duties of his appointment, and his thorough knowledge of the subject will relieve me from every apprehension that anything will be omitted in procuring or arranging the evidence in support of the Claims of the British Government which can in any degree tend to elucidate their justness or force."¹

Burrage says that Chipman, in the collection of evidence, had "the assistance of Phineas Bond, the British Consul at Philadelphia; Robert Pagan, a judge of the Court of Common Pleas (of New Brunswick), and others."² Among the "and others" there seems to have been a person who was able to supply the British minister and British consul at Philadelphia, in the early stages of the business, with copies of papers on which the United States relied, and probably with a copy of its claim. This person and the papers furnished by

¹ Rives, *Correspondence of Thomas Barclay*, 58.

² Burrage, *St. Croix Commission*, 5.

him are referred to in several letters of Mr. Bond, the British consul, to Mr. Barclay. The latter, however, cautioned Bond against him, saying that he was "a man of duplicity and not to be trusted." Bond feebly excused him, saying that the "person" referred to did not, in the present instance, conceive that he betrayed any confidence, but, on the contrary, "professed that Truth alone was the object of his Investigation." Bond not unnaturally concluded this euphemistic defense of the "person" by declaring: "Knowing Him as well as I did, there was little Danger that our Cause should suffer by a *Surcharge* of Confidence."¹

On the 12th of August 1796, Mr. Howell, Mr. Sullivan, Mr. Webber, professor of astronomy at Harvard College, and other members of the American party sailed from Boston for Halifax in an American sloop called the *Portland Packet*. As no commercial intercourse was at the time allowed between the United States and British North America in American bottoms, and there was risk of interruption by hostile cruisers if the party sailed in a British vessel, Great Britain being then at war with France, the *Portland Packet* was chartered specially for the voyage. She arrived at Halifax on the 16th of August. Her passengers were received with great hospitality and handsomely entertained, especially by the refugee loyalists.²

On the 21st of August, Mr. Barclay came up from Annapolis, and on the following day had his first official meeting with Mr. Howell. Mr. Chipman did not appear till the 24th of August.

On the 26th of August, Messrs. Barclay and Howell requested the agents to attend and advise them as to how far the two commissioners might proceed in the discharge of their duties before the appointment of a third. As has been seen, the treaty provided that the "said Commissioners" should meet at Halifax, and should have power to adjourn to such other place or places as they should think fit; and that they should have power to appoint a secretary and to employ such surveyors or other persons as they should judge necessary. Mr. Barclay, when in the United States, considered that he was prevented by his instructions from acting officially till he had met the American commissioner at Halifax. Mr. Sullivan had held a different interpretation of the treaty, maintaining that the meeting required to take place at Halifax was a meeting of the three commissioners, and that the commissioners appointed by the two governments might select a third prior to any

Official meeting
of British and
American Com-
missioners

Question as to
powers of two
Commissioners

¹ Rives, Correspondence of Thomas Barclay, 47, 48, 52-4, 54-6, 60, 64, 71.

² Amory, Life of Sullivan, I. 321.

meeting at Halifax. He had expressed this opinion to Mr. Barclay and Mr. Howell at Boston. But, while recalling this opinion, he now suggested that, as it had been determined at Boston that the commissioners required to meet at Halifax were the commissioners appointed by the two governments, they had the power under the treaty to appoint a secretary, order a survey, and adjourn. Mr. Chipman took the opposite view, holding that the two commissioners might when at Boston have selected a third; that the meeting required to be at Halifax was a meeting of the three; and that the two could perform no official act without the third. To this view both commissioners now assented. In this predicament Mr. Sullivan, perceiving that it might become necessary either to prolong the business till 1798 or else to take a third commissioner from Nova Scotia or New Brunswick, on the 27th of August filed a memorial, in which he suggested that the rivers should be surveyed and accurate maps of them be made before the parties submitted their evidence; and, adverting to the fact that the United States had caused Mr. Webber, "Professor of Mathematics and Astronomy resident at the University of Cambridge in Massachusetts," to repair to St. Andrews with the necessary apparatus from that university for fixing by observation the latitude and longitude of the St. Croix according to the provisions of the treaty, he proposed that the agents should proceed, "under the countenance and advice of the two Commissioners present," to procure "artists,"¹ with their necessary attendants, to fix the latitude and longitude of the mouths of the Schoodiac and Magaguadavic, and to make accurate surveys and maps of those rivers. He further suggested that the British agent should sign his assent "to this proposal in the presence of the commissioners." Mr. Chipman signed his assent accordingly, and the two commissioners signed the following "advice":

The two Commissioners now present do not consider themselves (without the presence of the third) as having authority to give an official answer to the foregoing Memorial, or to order a Survey agreeably to The Treaty of Amity &c. relating to this case, but, as a Survey will be necessary in the business, and the having it effected this season will hasten the decision, We, in our Individual Capacity, advise the Agents to proceed to have a Survey made, and to procure Artists, agreeably to the said proposals contained in the said memorial.²

THO BARCLAY
DAVID HOWELL

¹ This word evidently was then still in use in New England in the now obsolete sense of scientific men in general.

² MSS. Dept. of State.

On the receipt of this advice the agents agreed forthwith to take steps to have surveys made of Passamaquoddy Bay, its islands and shores, and of the rivers Schoodiac and Magaguadavic and their branches, and to have the latitude and longitude of the mouths of the rivers determined, in the hope that the field work might be completed before the winter set in.¹

On the day on which this agreement was reached, Mr. Howell reported that from "the good disposition manifest" in the discussions between Mr. Barclay and himself as to their powers and duties and as to the preliminaries, he was led to hope that they would be able "to agree on a gentleman of respectability for the third commissioner" without resorting to the alternative of a lot.¹ On the 30th of August they agreed on Egbert Benson, whose name was suggested by Mr. Howell at Boston in the preceding June. "After a Weeks communication at Halifax," wrote Mr. Barclay, "the American Commissioner and myself agreed in the Choice of Egbert Benson of the City of New York Esq^r as the third Commissioner—A Gentleman of undoubted Ability and Integrity, and who from being a near relation was brought up in my fathers family. I found it impracticable for M^r Howell the American Com^r and myself ever to agree upon any other person, and that unless I joined in the appointment of Judge Benson, we must proceed to the unpleasant alternative of balloting for the third Commissioner. To this I am extremely averse, from a conviction that by this measure the question would be decided rather by lott, than on its merits—I was convinced of the Justice of His Majestys Claim, and the indisputable authorities that could be adduced to support it.—To leave it therefore to a ballot, would be putting what I looked on as a certainty in hazard, a game I by no means conceived myself authorized to play.—It is true the American Commissioner gave me the names of two or three Gentlemen in England, one of whom he was willing should be opposed to M^r Benson, but these Gentlemen, I learned were warm minority men, and I did not conceive it probable they would leave their pursuits and cross the Atlantic, on such a question and under our nomination.—Thus circumstanced I judged it most for His Majestys interest to give up the only possible objection to M^r Benson, that of his being an American, under the hope of having a cool, sensible, and dispassionate third Commissioner—His future conduct I trust will prove the propriety of my determination."²

¹ Mr. Howell to Mr. Pickering, Secretary of State, August 27, 1796. MSS. Dept. of State.

² Rives, Correspondence of Thomas Barclay, 62, 63.

Mr. Benson, who was a native of New York and a graduate of King's College, was at one time a judge of the supreme court of New York, of which State he was the first attorney-general. He was one of the three commissioners appointed by the United States for inspecting and superintending the embarkations of British troops on their withdrawal from New York, in conformity with the stipulations of the treaty of peace.¹ He was subsequently a judge of the circuit court of the United States. That his appointment as third commissioner was warmly approved by Mr. Sullivan, the agent of the United States, is shown by the following letter to John Jay, who was then governor of the State of New York:

HALIFAX, *30th August, 1796.*

SIR: The controversy respecting that part of the boundary between the United States and the Dominions of his Britannic Majesty, which is on the river St. Croix, is now a matter of some moment. The Commissioners have proceeded with that good humor and candour on the subject which seemed to promise a happy & amicable termination of the dispute. Instead of casting lots, they have taken the first idea of the Treaty of November 1794, and have elected a third Commissioner; Judge Benson is the only gentleman in whom they could unite.

They have sent him a commission by this conveyance, and a vessel to bring him on. I earnestly hope that your Government will allow him to attend upon it, and that all his friends who wish the late Treaty with Great Britain to be carried into effect in such a manner as to assure the peace and happiness of our country will use their influence with him to accept the appointment. A letter which I have written to him by this conveyance will I believe satisfy him that the task will not be so arduous as he may at first imagine. Should he decline the process, the consequence will inevitably be, that two men will be put in the box on whom no confidence will be placed by the other side, the consequence of which is easily seen without any explanation. I am [etc.]

JAS. SULLIVAN

His Excellency Governor JAY.

That Jay was predisposed to regard the selection with favor may be inferred from a letter written at Passy, September 12, 1783, in which he addresses Benson as "My Good Friend."²

Benson was notified of his appointment as third commissioner both by Messrs. Barclay and Howell and by his own government, and to the latter he wrote the following letter:

¹ Am. State Papers, For. Rel., I. 190 et seq.

² Johnston, Correspondence and Public Papers of John Jay, III. 74.

SIR: I received Your Letter last evening on my Return Home from the northern Circuit—At Albany I met the Messenger with the Letter from Col^o. Barclay and Judge Howell informing Me they had chosen Me as the third Commissioner with them under the fifth Article of the Treaty—The Trust not being incompatible, and as it will interfere with my present Office occasionally only and for a short Period, an Acceptance of it therefore appeared to Me indispensable on my part—That my own Judgment has coincided with the Wishes of the President certainly affords Me a very sensible satisfaction—I set out on Monday to meet the other Commissioners on the 3^d of the ensuing Month at Passamaquaddy—I remain [etc.]

EGB^t BENSON

NEW YORK, *Sep^r. 17th 1796.*

Hon^{ble} TIMOTHY PICKERING, Esq^r.

Commissioners Barclay and Howell issued to Benson the following commission:

Thomas Barclay Esquire, the Commissioner appointed by his Brittannic Majesty and David Howell Esquire the Commissioner appointed by the President of the United States of America, by and with the advice and consent of the Senate thereof, to meet confer and conclude with a third Commissioner to be appointed in the manner prescribed in the fifth article of the Treaty of Amity, Commerce and Navigation concluded at London the nineteenth day of November in the Year of our Lord One thousand seven hundred and ninety four, between his said Brittannic Majesty and the said United States, upon the doubts that have arisen what river was truly intended under the name of the river Saint Croix, mentioned in the Treaty of Peace concluded between his said Brittannic Majesty and the said United States on the third day of September in the Year of our Lord One thousand seven hundred and eighty three—

To all to whom these Presents shall come Greeting—

WHEREAS in the said fifth article of the said treaty of Amity, Commerce and Navigation between his said Brittannic Majesty and the said United States, it is recited that doubts have arisen what river was truly intended under the name of the river S^t. Croix mentioned in the said Treaty of peace, and forming a part of the boundary line therein described—

AND WHEREAS in the same fifth article of the said Treaty of Amity, Commerce and Navigation between his said Brittannic Majesty and the said United States it is declared that the question respecting the said river shall be referred to the final decision of Commissioners to be appointed in the following manner, to (wit)—One Commissioner to be named by his said Majesty, and one by the said President of the said United States, by and with the advice and consent of the Senate thereof; and a third Commissioner to be agreed on and chosen by the said two Commissioners so respectively to be named as aforesaid—Or if they cannot so agree,

then by their each proposing one person, and of the two names so proposed, by having one drawn by Lot in the presence of the said two original Commissioners—

NOW KNOW YE—That we the said Thomas Barclay and David Howell the said two original Commissioners so respectively appointed as aforesaid, have agreed upon Egbert Benson of the City of New York in the United States of America Esquire to be the said third Commissioner—

And that the said Egbert Benson is accordingly in manner aforesaid appointed to be the said third Commissioner, with us to perform and execute all such matters and things as may be expedient and necessary for duly carrying on, and compleating the examination and decision of the doubts herein before-mentioned, and for the final settlement thereof in the manner provided in the said Treaty of Amity, Commerce and Navigation between his said Majesty and the said United States—

In Testimony and confirmation of all which, We the said Thomas Barclay and David Howell, the said two original Commissioners so respectively appointed as aforesaid have hereunto subscribed our names and affixed our seals at Halifax in the province of Nova Scotia, this thirtieth day of August in the Year of our Lord, One thousand seven hundred and ninety six—

[SEAL] THO^s. BARCLAY

[SEAL] DAVID HOWELL ¹

When the commissioners exhibited their commissions ² it was found that the commission of Mr. Howell, after reciting the provisions of the treaty, authorized him, in general terms, “with those other Commissioners, being duly sworn, to proceed to decide the said Question, and exactly to perform all the duties enjoined and necessary to be done, to carry the said fifth Article into compleat execution”; while the King’s commission to Mr. Barclay declared, “We will give and cause to be given full force and effect to such final decision in the premises as by our said Commissioner together with the other two Commissioners above mentioned, *or by the major part* of the said Three Commissioners, shall duly be made according to the Provisions of the said Treaty.” Mr. Barclay, observing this variance, requested Mr. Howell to bring it to the notice of his government, in order that his commission might be made to conform to that of the British commissioner. Mr. Howell, who doubtless was not aware of the fact

Question as to powers of a majority of the Commission

¹ The foregoing commission is given as it is recorded in the Appendix to the Journal of the Commission, II, in the Department of State. There is another copy in the Department of State, in the volume labeled “Papers Relative to the Commissioners under the 5th Article of the Treaty of 1794 with England, North E. Boundary.” The two texts differ to a certain extent in capitalization and punctuation, but not otherwise, except that the word “Brittannic”, as it appears in the copy here printed, is in the other copy properly spelled “Britannic.”

² Supra, 11, 13.

that on the 26th of the preceding July the Attorney-General of the United States, Mr. Lee, had advised the Secretary of State that the concurrence of all three commissioners was necessary to a decision,¹ declined to accede to this request, declaring that it was not only his own opinion but that of every man in office in the United States with whom he had conversed on the subject, that a declaration under the hands and seals of a majority of the commissioners would be final and conclusive.² Relying on this declaration, and on his own opinion as to the proper construction of the article, Mr. Barclay decided to proceed with the arbitration, and referred the question to his government. Lord Grenville, though he considered the variation "extremely unimportant in itself," instructed the British minister at Philadelphia, Mr. Liston, to propose an exchange of declarations to the effect that the decision of a majority of the commissioners would be accepted as valid, at the same time observing that no decision could be rendered but in the presence of the three commissioners.³ Mr. Liston, on reading his instructions, failed to perceive the point in doubt, and based his representations on the absence from Mr. Howell's commission of an explicit declaration that the United States would give the final decision of the commissioners "full force and effect," with the result "that Colonel Pickering was a little hurt as well at the imputation of inaccuracy or insufficiency thus cast on an Instrument which had been carefully drawn up by himself, as at the surmise that appeared to be started respecting the sincerity and good faith of the Government of the United States." "I did not, therefore," says Mr. Liston, "insist upon any changes being made in Mr. Howell's Commission, and contented myself with a general declaration, made to me by authority, that the President would give the decision of the Commissioners full force and effect."⁴

Subsequently, on April 1, 1797, Mr. Liston laid the question before Mr. Pickering, in a note in which, after quoting from the commissions, he said: "It is by command of my superiors, sir, that I state this circumstance to you, not doubting that I shall receive assurances that whatever difference there may be between the tenour of Mr. Howell's commission and that of Mr. Barclay, the American Government is no less determined than that of Great Britain to consider as final and conclusive the decision of the three commissioners in question or a

¹ Opinions of the Attorneys-General, I. 66.

² Mr. Barclay to Lord Grenville, August 30, 1796, Rives, Correspondence of Thomas Barclay, 57.

³ Rives, Correspondence of Thomas Barclay, 72.

⁴ Mr. Liston to Mr. Barclay, October 30, 1797, Rives, Correspondence of Thomas Barclay, 77.

majority of them respecting the River St. Croix in the Treaty of Peace, and that the President will readily take every step that may be necessary to give full force and effect to their award on that subject whatever it may be." It is to be observed that the assurance asked for by Mr. Liston applied as well to the decision of the three commissioners as to that of a majority of them. In his reply of April 3, 1797, Mr. Pickering refers to Mr. Liston's note as relating "to the difference in the forms of the commissions," but does not advert to the words "a majority of them." He merely says that Mr. Howell's commission is "deemed adequate," and declares: "The award of the commissioners will derive its binding force from the treaty itself, which being by our Constitution a supreme law of the land, the President is of course *to take care that it be faithfully executed*. This is his constitutional duty, sanctioned by his solemn oath the force and effect of which can by no declaratory words be increased. Nevertheless, to evince the candour of the American Government, and to satisfy that of Great Britain, the President has no hesitation to assure his Britannic Majesty, that the Government of the United States, agreeably to the stipulation of the treaty, 'will consider the decision of the Commissioners aforesaid as final and conclusive, so as the same shall never thereafter be called in question, or made the subject of dispute or difference between them,' and that in conformity with his duty as the Chief Executive power of the United States, he will give to that decision its full force and effect."¹

In a letter to Mr. Barclay of June 11, 1798, only four months before the decision of the commissioners was rendered, Mr. Liston said: "I shall now take an opportunity of explaining the matter to Colonel Pickering; though the distance of time is so great and the dissatisfaction showed by him was so slight, that it is hardly worth while to return to the subject."² It does not appear that the subject was mentioned again.

After the selection of the third commissioner the agents proceeded to Passamaquoddy Bay to institute the surveys. They were soon followed by Commissioners Barclay and Howell, who, in order to avoid compelling the agents to attend at Halifax, adjourned to St. Andrews, in the province of New Brunswick, where they notified Mr. Benson to meet them on the 3d of October.

Adjournment to
St. Andrews

On September 24, 1796, Mr. Sullivan, who had arrived at St. Andrews on the 12th of that month, sent to Mr. Pickering a letter in

¹ MSS. Dept. of State. ² Rives, Correspondence of Thomas Barclay, 86.

which the local conditions and the state of the work at that time are vividly set forth. This letter reads:

S^t. ANDREWS, 24th Sep^r. 1796.

SIR: I have the honor to refer you to my letter from Halifax of the 30th ult^o. and to my letter from Machias of the 10th instant.

We arrived at this place, which is poor and miserable enough, without farms or improvements, on the 12th; and not finding the British agent here, we went and left our cards at the house of the presiding Magistrate of the place. Very soon after, we were visited by the gentlemen belonging to the settlement. We informed them of our business, and intentions; and that, as the agent or astronomer of the British Government was not present, we wished to proceed to the Magadadawick, for the purpose of making astronomical observations. They treated us with great politeness; and afforded us every needed assistance. We had a house suitable for the business erected on that river; and the Instruments placed on the 14th. There has not yet arrived any astronomer from the British Government; nor do I much expect one. Professor Webber is very assiduous, but the weather has been cloudy when ever there has been an eclipse of the Planet Jupiter.

Ward Chipman, Esq^r. who has a commission, as agent to the British Government, issued by the *Governor* of New Brunswick, reciting an order of the King for that purpose, arrived here on the evening of the 22^d.

The surveyors and Chainmen which I had engaged had arrived on the 20th. There is only one of their surveyors yet come. We are making provision to get the surveyors on their business. Indeed I am ready with mine, because I brought bread and meat from Boston with me for them, as well as some other necessaries.

They ordered one Colonel Mellidge [?] who is a loyalist from New Jersey to go on the Schoodiac, where I send M^r. Chaloner on our side. A M^r. Heyden is expected by them to go on the Magadawick, with M^r. Peters who goes for me. The orders to the surveyors will not be perfected so that I can send a copy by this mail.

In your Letter of the 6th of August you mention, that it was not convenient for you to order any more money at that time, but that it would be ready when ever it should be needed.

I advanced to Judge Howell.	600 D ^{rs} .
The preparations provisions &c at Boston.	600
& more I have not the accounts here	
The vessel which was indispensibly necessary but cheaper than was made in the Estimate will be.	1000
Money which I brought with me, and which will be expended with more in the tour for the busi- ness independant of my own expense.	500
	2700

I have engaged the surveyors, and chainmen &c to forward money to Judge Jones of Machias, for their services, as soon as their work is done. The surveyors will have a guinea a day, and the men one Dollar, besides their provisions. The time calculated will be seven weeks on the rivers, besides the Bay of Passamequody, which the British agent insists to have surveyed. The labourers Cooks &c attending and the Astronomer are to be paid. As to myself, having laid aside a more lucrative, and much less expensive business for this, it may become necessary to my finances to receive money from the United States.

The business, from Delays of one kind and another, wears a tedious aspect; and I think that it cannot fail of being very expensive to the nations. But there is a considerable expence arising from the collection of evidence which cannot be a common charge.

The vessel which the two original Commissioners sent for Judge Benson has not yet returned. Her delay encourages me to hope that she is detained by his orders. Should he fail of coming I shall be exceedingly anxious. Indeed I am very anxious now.

There was not fair play in the appointment of Colonel Barclay. The Inhabitants here, universally, are of the description of People called Loyalists. They readily own in conversation, that the Governors of Nova Scotia, and New Brunswick, are under restrictions not to grant any Lands to any person excepting to that description of men. It is well known that Colonel Barclay is their agent, and has authority to locate for them. Those facts do not admit of regular proof, because that no American at this Juncture can be admitted to the records, and yet they are as notorious as the existence of the federal City.

Colonel Barclay, as I apprehend, will not propose any Person for a commissioner, if Mr. Benson does not come, but one who is a loyalist. The surveyors they employ, and all who appear in their suite are of that class. It is said the Secretary agreed upon is one.

In this business, should it come to a lot, they do not play at an equal game. The claim of Nova Scotia was never before the revolution, calculated, by that Government, or the lines to which they now claim. The Lands between the Magadadawick and the Schoodiac, are of no consideration in comparison with the Lands of forty miles wide and one hundred and twenty or perhaps fifty miles long, on the west-side of the Schoodiac which they now contend for. This claim they have no chance to maintain, in any other mode than by the management of the third Commissioner whom they wish should be a Loyalist or Novascotian. I see no objection to a character, which in the Treaty of peace is designated a *real British Subject*.

The County of Washington, and the one half the County of Hancock are of too much consequence to one of the States, and to the union of course to be sported with in this mode.

The true meaning of the Treaty can never, in my opinion Justify the measure. When the method of a lot was agreed upon, it must have been the intention of the contracting parties that fair

disinterested impartial men should be put into the Box. Otherwise why is the idle formality of an oath; the force of which, in civil controversies, rarely controuls the feelings of interest, and in concerns with other nations has much less efficacy? If the business was to be transacted by interested, or prejudiced men, a congress of negotiation instead of a Bench of Judges, under the formal obligation of an oath would have been agreed upon. But I hope that the appearance of Mr. Benson will dissipate this very uncomfortable cloud—

I have the honor [etc.]

JA SULLIVAN

Hon. TIMOTHY PICKERING, Esq^r,
Secretary of State at Philadelphia.

The first formal meeting of the full board took place at St. Andrews on October 4, 1796, Messrs. Barclay, Howell and Benson all being present. On assembling they were severally sworn, according to the provisions of the treaty, before Robert Pagan,¹ one of the judges of the Court of Common Pleas for Charlotte County, New Brunswick, in the following form:

First meeting of
full Board

I ————— One of the Commissioners appointed in pursuance of the fifth article of the Treaty of Amity, Commerce and Navigation between His Britannic Majesty and The United States of America, Do swear That I will impartially examine and decide the Question, what River was truly intended under the name of the River Saint-Croix mentioned in the Treaty of Peace between His said Majesty, and the said United States, and forming a part of the Boundary therein described, according to such evidence as shall respectively be laid before me on the part of the British Government, and of the United States.

So help me God.

The commissioners then appointed Edward Winslow, of Fredericton, New Brunswick, but formerly of Plymouth, Massachusetts, as secretary to the board. His appointment, it appears, had previously been agreed upon by Messrs. Barclay and Howell.² He took as secretary to the commission the following oath:

Appointment of
Secretary

I Edward Winslow appointed Secretary to the Board of Commissioners appointed in pursuance of the fifth article of the Treaty

¹ Robert Pagan "was a native of North Britain and during the Revolution lived at Penobscot. At the peace of 1783 he came to St. Andrews with his family, where he was for years a leading merchant and magistrate. He represented Charlotte County in the house of assembly from the formation of the province and for many years afterwards, and died at St. Andrews in 1821, aged 71 years, universally respected and deeply regretted." Winslow Papers, edited by Raymond, St. John, N. B., 1901, 456.

² Letter of Sullivan to Pickering, Sept. 24, 1796, *supra*, 29.

of Amity, Commerce and Navigation between His Britannic Majesty and The United States of America. Do Swear—That I will faithfully execute the Trust reposed in me. So help me GOD.

Winslow, who was a lineal descendant of Edward Winslow, the Mayflower pilgrim and first governor of Plymouth Colony, was born at Plymouth, Massachusetts, February 20, 1746. A graduate of Harvard in 1765, and a founder of the Old Colony Club, he delivered in 1770 the first anniversary address ever made on the landing of the Pilgrims. When the revolution came, he, like his father, who held office under the colonial government, remained loyal to the Crown, and, when Lord Percy went to the aid of Major Pitcairn at Lexington on April 19, 1775, acted as Percy's guide. When, later, the British forces retired, Winslow, who had been appointed by General Gage as collector of the port of Boston and Registrar of Probate for Suffolk County, went to Halifax; but he soon proceeded to New York, where he became muster-master-general of the loyalist forces, with the rank of lieutenant colonel. He saw active service in Rhode Island and elsewhere, and, at the close of the war, Sir Guy Carleton sent him to Nova Scotia to arrange for the disbanding and settlement of the loyalist regiments. After the division of Nova Scotia, which he was largely instrumental in bringing about, he was appointed a member of His Majesty's Council for the new province of New Brunswick. He eventually held several other public offices there, becoming in 1807 a judge of the provincial supreme court; and for a time he was administrator of the government as senior member of the executive council. He died at his residence at "King's Wood" on May 13, 1815.

That Winslow originally aspired to something higher than the secretaryship of the Commission appears by a letter which he wrote at Kingsclear, January 14, 1797. In this letter, which furnishes interesting details as to Ward Chipman, Winslow, after referring to the "cordial friendship" subsisting between Chipman and himself, said:

The office of secretary is not what I originally aimed for. If I had been chosen Umpire I should have acted under every possible restraint. For the duties of the office of secretary I feel myself every way equal; I fear no reflection and will in no degree be responsible for the consequences which may attend the decision. It will be laborious, perhaps not lucrative. One advantage must result both to Chipman and myself: it has taken us from that dreamy path which both of us have been imperceptibly sliding into—obscurity and despair. During the first bustle here we combatted difficulties with alacrity, and we submitted to inconveniences

without murmuring. As soon as this was over and the eagerness of expectation had subsided, we saw the whole society sinking into a sort of lethargy. . . . I was the proprietor of a tract of land "beautifully situated upon a navigable river and covered with prodigious fine timber." But the river glided by without material advantage to me, for I could not buy a Boat, and the trees might have stood to eternity for I had hardly credit for an axe. I have dashed at every opening, but a wife, ten children, and the gout have held me fast. Chipman was not quite so badly off: he had saved a little cash, so that he did not feel the weight so soon, but when it fairly rested on his shoulders down he dropped, and it would have grinded the heart of a man of sensibility to have watched his countenance for the last two or three years. The late appointment has revived—nay has regenerated him. It may not be of long continuance, and in a pecuniary view possibly will not be very beneficial, but it is an honourable mark of confidence, and it has brought him into a field where he may exert his talents. The vigor of his mind is unabated and he is industrious almost beyond example. I presume he will secure so much credit to himself by his correct management of this important business that it will lead to something which may render the remainder of his days comfortable. For myself I cannot anticipate any substantial benefits from the employment, and yet I am highly gratified at it. I am almost ready to exclaim like General Ruggles' Indian, when his friends were preparing the last offices for him: "My dear Brothers, you shan't bury me yet."¹

IV. Boundary Claims

The formation of the board having thus been completed, Mr. Sullivan appeared and, producing his commission as agent on the part of the United States, presented, in the form of a written "suggestion," a claim to the Magaguadavic as the true boundary. This claim reads:²

United States
claims the
Magaguadavic

To the Honourable The Commissioners appointed pursuant to the fifth article of the Treaty of Amity, Commerce and Navigation, lately made between The United States and His Britannic Majesty, to examine and decide What is *The River Saint Croix* mentioned in and truly intended under the name of *The River Saint Croix*, in the Treaty of Peace, concluded between His said

¹ Edward Winslow to Jonathan Sewell, Jan. 14, 1797, Raymond, Winslow Papers, 709-10. Opposite p. 656 of this work there is a picture of Chipman, as Chief Justice of New Brunswick.

² The text is given here as it is found in the copy in vol. 3 of the records of the Commission, where it is certified by Edward Winslow, secretary to the board, as a "true copy," under the title: "Memorial of Claim for the United States of America, filed before the Board of Commissioners, at Saint Andrews, on the fourth day of October, 1796, by their Agent, James Sullivan." The language is the same as that of the text as recorded in the journal, apart from some immaterial differences in punctuation and spelling, evidently due to variations in the habits and taste of the original copyists.

Majesty, and The United States, in the Year one thousand seven hundred and eighty three.

The Undersigned Agent for The United States, by virtue of a Commission from the President thereof; being now before your Honourable Board, has the honour to suggest, That a certain River called by the Indians—The *Magaquadavie*, and which River empties its waters into the Bay of Passamaquoddy, on the north-easterly side thereof, is the River Saint Croix mentioned in and truly intended under the name of the River Saint Croix, in the Treaty of Peace, concluded between the United States and His said Majesty, in the year one thousand seven hundred and eighty three; And that the same River forms a part of the Boundary in the same treaty described.

Wherefore the said Agent for The United States, on the behalf of the same, prays—That your Honourable Board will be pleased to form and deliver a Declaration according to the said fifth Article of the said Treaty of Amity, Commerce and Navigation, describing the same River, and particularizing the Latitude and longitude of its mouth and Source.

The said Agent for The United States has the honour further to suggest—That if the Agent on the part of His Britannic Majesty, shall file a suggestion, that any other River, Stream, or Water, is the River Saint Croix named in and truly intended in the said treaty of peace, under the name of The River Saint Croix, and forming a part of the Boundary therein described; The said Agent for The United States will be ready on a day given for that purpose, and after the necessary surveys shall be ordered and made, to lay such Evidence before your Honourable Board as shall be proper and necessary on the Question submitted to your decision.

JA SULLIVAN

October the 4th 1796.

Mr. Chipman then appeared and, producing his commission as agent on the part of his Britannic Majesty, presented a written claim to the Schoodiac as the river intended by the name
St. Croix. This claim reads as follows:¹

Great Britain
claims the
Schoodiac

To the Honourable The Commissioners appointed pursuant to the fifth Article of the Treaty of Amity—Commerce and Navigation, concluded between His Britannic Majesty and The United States of America on the Nineteenth day of November one thousand seven hundred and ninety four, to decide What River, is the River Saint Croix truly intended under the name of the River Saint-

¹ The statement made in the footnote, *supra*, as to differences in punctuation and spelling in the record copy of Mr. Sullivan's memorial, is equally applicable here. Moreover, a comparison of the text of Article II of the Treaty of Peace of 1783 as given in the record copy of Mr. Chipman's memorial with the correct text of the article, *supra*, 2, will show not only discrepancies in punctuation and in spelling, but also the evidently accidental omission of the clause "thence along the middle of said water communication into the Lake Huron."

Croix by the Treaty of Peace, between His said Majesty & The said United States and forming a part of the Boundary therein described.

Whereas by the second Article of the Treaty of Peace concluded at Paris on the third day of September in the year of our Lord one thousand seven hundred and eighty three between His Britannic Majesty and the United States of America, it is agreed in the words following to wit.

“Article II. And that all disputes which might in future arise on the subject of the boundaries of the said United States, may be prevented, It is hereby agreed & declared that the following are, and shall be their boundarys, viz:

“From the northwest angle of Nova Scotia, viz, that angle which is formed by a line drawn due north from the source of Saint Croix River, to the Highlands—along the said Highlands which divide those Rivers that empty themselves into the River Saint Lawrence, from those which fall into the Atlantic Ocean to the northwesternmost head of Connecticut River. Thence down along the middle of that river to the forty fifth degree of north latitude. From thence by a line due west on said latitude untill it strikes the River Irroquois or Cataraquy. Thence along the middle of said River into Lake Ontario; through the middle of said lake until it strikes the communication by water between that Lake and Lake Erie; Thence along the middle of said communication into lake Erie, through the middle of said Lake untill it arrives at the water communication between that Lake & Lake Huron; thence through the middle of said lake to the water communication between that Lake & Lake Superior—thence through Lake Superior, northward of the Isles Royal, and Philipeaux, to the long-Lake thence through the middle of said Long-Lake and the water communication between it and the Lake of the Woods to the said Lake of the Woods, thence through the said Lake to the most northwestern point thereof, and from thence on a due west course to the River Mississippi; thence by a line to be drawn along the middle of said River Mississippi untill it shall intersect the northern most part of the thirty first degree of north latitude, south by a line to be drawn due East from the determination of the line last mentioned in the latitude of thirty one degrees north of the equator to the middle of the River Apalachicola or Catahouche. Thence along the middle thereof to its junction with the Flint River—thence strait to the head of Saint Marys River and thence down along the middle of saint marys river to the Atlantic Ocean. East by a line to be drawn along the middle of *The River Saint Croix*, from its mouth in the Bay of Fundy to its source, and from its source,—directly north to the aforesaid Highlands, which divide the rivers that fall into the Atlantic Ocean from those which fall into the River Saint Lawrence; Comprehending all Islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova-Scotia on the one part, and

East Florida on the other, shall respectively touch the Bay of Fundy, and the Atlantic Ocean; excepting such Islands as now are or heretofore have been within the limits of the said province of Nova Scotia." As by the said Treaty, it doth appear.

AND WHEREAS

In the fifth article of the Treaty of Amity, Commerce and Navigation concluded at London on the nineteenth day of October one thousand seven hundred and ninety four between His said Majesty and The said United States it is recited—That Doubts have arisen What River was truly intended under the name of The River Saint-Croix mentioned in the said Treaty of Peace, and forming a part of the boundary therein described. Which Question is referred to the final decision of this Honourable Board.

AND WHEREAS

In and by the said second article herein before recited of the said Treaty of peace it appears to be clearly intended—That no part of the province of Nova Scotia should be thereby ceded by His said Majesty to the said United States—. But that the said province of Nova Scotia according to its ancient and former limits should be and remain a part of the Territories and Dominions of His said Majesty as his said Majesty then and before that time had held and possessed the same.

AND WHEREAS

In and by the twelfth section of the tenth Chapter of an Act of the Parliament of Great Britain, made and passed in the fifteenth Year of the Reign of His said Majesty It is enacted, "That the River which emptieth itself into Passamacadie or Passamaquadi Bay on the Western side, and is commonly called and known by the name of St. Croix River, be held and deemed for all purposes in that Act contained to be the boundary between the Provinces of Massachusetts-Bay and Nova Scotia," as by the same Act of Parliament it doth appear.

AND WHEREAS

the said St. Croix River mentioned in the said recited section of the said Act, is the same river which forms a part of the Original boundaries and limits of the said province of Nova Scotia as described in the Letters Patent or Grant thereof made by His late Majesty King James the first to Sir William Alexander bearing date the twentieth day of September one thousand six hundred and twenty one.

AND WHEREAS

In the same Letters Patent among other things therein contained: the said Province of Nova Scotia is given and granted to the said Sir William Alexander in the words following to wit:—

"Dedimus, concessimus et disposuimus, tenoreque præsentis chartæ nostræ damus, concedimus et disponimus, præfato domino Willielmo Alexandro hæredibus suis vel assignatis quibuscunque

hæreditamentis, omnes et singulas terras continentis et insulas, situatas et jacentes in Americâ, intrâ caput seu promontorium communiter Cap de Sable appellatum, jacens propè latitudinem quadraginta trium graduum, aut eò circa ab equinoctiali lineâ versùs septentrionem, à quo promontorio versùs littus maris tendens ad occidentem ad stationem navium Sanctæ Mariæ, vulgò Sainct Mary's Bay, et deinceps versùs septentrionem per directam lineam introitum, sive ostium magnæ illius stationis navium trajicientem, quæ excurrit in terræ orientalem plagam inter regiones Suriquorum et Hecheminorum vulgò Souriquois et Etchemins, *ad fluvium vulgò nomine Sanctæ Crucis appellatum, et ad scaturiginem remotissimam sive fontem ex occidentali parte ejusdem*, qui se primùm prædicto fluvio immiscet; undè per imaginariam directam lineam quæ pergere per terram seu currere versùs septentrionem concipietur ad proximam navium stationem, fluvium vel scaturiginem in magno fluvio de Canada sese exonerantem; et ab eo pergendo versùs orientem per maris oras littorales ejusdem fluvii de Canada, ad fluvium stationem navium portum aut littus communiter nomine de Gachepe vel Gaspé notum et appellatum; et deinceps versùs Euronotum ad insulas Baccalaos vel Cap-Breton vocatas, relinquendo easdem insulas à dextrâ, et voraginem dicti fluvii de Canada, sive magnæ stationis navium, et terras de Newfoundland cum insulis ad easdem terras pertinentibus à sinistrâ, et deinceps ad Caput sive Promontorium de Cap-Breton prædictum, jacens propè latitudinem quadraginta quinque graduum aut eò circa; et à dicto promontorio de Cap-Breton versùs meridiem et occidentem ad prædictum Cap de Sable ubi inceptit perambulatio *includens et comprehendens intrâ prædictas maris oras littorales ac earum circumferentias à mari ad mare, omnes terras continentes cum fluminibus, torrentibus, sinibus, littoribus, insulis, aut maribus jacentibus propè aut infrâ sex leucas ad aliquam earundem partem, ex occidentali, boreali vel orientali partibus orarum littoralium et præcinctuum earundem*, et ab Euronoto ubi jacet Cap-Breton, et ex australi parte ejusdem (ubi est Cap de Sable) omnia maria ac insulas versùs meridiem intrâ quadraginta leucas dictarum orarum littoralium earundem, magnam insulam vulgari-ter appellatam Isle de Sable vel Sablon includendo, jacentem versùs Carban, vulgò south south east, circa triginta leucas à dicto Cap-Breton in mari, et existentem in latitudine quadraginta quatuor graduum aut eò circa. Quæ quidem terræ prædictæ omni tempore futuro, nomine novæ Scotiæ in Americâ gaudebunt, . . . atque etiam si quæ quæstiones aut dubia super interpretatione aut constructione alicujus clausulæ in hâc præsentî chartâ nostrâ contentæ occurrent, ea omnia sumuntur et interpretabuntur in amplissimâ formâ et in favorem dicti domini Willièlmi, suorumque prædictorum. . . ." (Mémoires des Commissaires du roi et de ceux de sa Majesté Britannique, sur les possessions et les droits respectifs des deux Couronnes en Amérique; Avec les Actes publics et Pièces justificatives. Tome Second, Contenant les Traités et Actes publics concernant l'Amérique en général, et les Pièces justificatives des

Mémoires sur les limites de l'Acadie. A Paris, de L'Imprimerie Royale. M. DCCLV. vol. 2. pp. 195, 196, 197, 198 and 217.)

AND WHEREAS

The said River Saint-Croix mentioned in the said Act of Parliament and in the said Letters Patent, was originally called by that name by the French who first discovered the same in or about the year one thousand six hundred & four—As may appear by the Authentic history and accounts thereof, written by French Navigators and Historians of undoubted credit and Authority.

AND WHEREAS

The descriptions given by the said Authors and Navigators of the said River Saint Croix exactly correspond and agree with the said River S^t. Croix mentioned in the said Act of Parliament, which emptieth itself into Passamaquody-Bay, on the western side; and which River has for some years past been called Scoudiac by the native Indians, and extends itself westward near to the River Penobscot.

AND WHEREAS

There is no other River which empties itself in or near to the said Bay of Passamaquody which will be found, as the said Agent humbly conceives, in any degree, to answer or correspond with the said descriptions of the said River so as aforesaid originally called the River Saint Croix.

AND WHEREAS

One and the same River has from the said year 1604, been eminently, uniformly and universally referred to and contemplated under the name of the River Saint Croix, in all histories, public documents and Acts of State of the highest nature and Authenticity both in the English and French Nations, and one River *only* has been so contemplated and referred to, under the name of The River Saint Croix.

AND WHEREAS

There is no other River or Stream, by whatever name or names the same may be or may have been called, which empties itself in or near to the said Bay of Passamaquody, which is of any considerable magnitude, or which from its magnitude can be a proper boundary between different provinces, Countries, or States when compared or put in competition with the said River Saint Croix.

AND WHEREAS

The western-branch of the said River Saint-Croix extending itself near to the River Penobscot has always been, and now is justly, properly and truly called The Main Branch of the said River, by whatever name the same river may at any time have been called, whether Passamaquody—Scoudiac—or Saint Croix.

AND WHEREAS

The said River Saint-Croix mentioned in the said second Article of the said Treaty of Peace is therein mentioned as a well known River and Boundary.

AND WHEREAS

The said province of Nova Scotia has from the date of the said Letters Patent to the said Sir William Alexander, to the year 1784, been bounded westward by the said River Saint Croix mentioned in the said Letters Patent to the western source thereof.

AND WHEREAS

The said undersigned Agent for His Majesty, can establish by good and substantial proofs and evidence all and singular the facts matters and things herein before set forth when and where the same shall be judged expedient and necessary, or this Honorable Board will condescend to hear the same.

AND WHEREAS

From all and singular the premises the following Conclusions may be drawn.

1st.

That the River Saint Croix, so originally named by the French in the year 1604, and recognized in the said Letters patent in the year 1621, and uniformly from the time last mentioned referred to and known as the boundary of the said province of Nova Scotia, in all authentic histories, public Documents, and acts of State both in the English and French Nations—Is the River Saint Croix truly intended by the said treaty of peace between His said Britannic Majesty, and the said United States.

2nd.

That the northwest angle of Nova Scotia, mentioned in the said second article of the said Treaty of Peace is formed by a line drawn due north from the said western source of the same River Saint Croix to the Highlands mentioned in the same article.

The said Undersigned Agent of His said Britannic Majesty therefore on behalf of his said Majesty, has the honor to request

That all and singular the premises being duly considered, this Honorable Board will proceed by a declaration under their hands and seals to decide the said River Saint Croix otherwise called the Scoudiac, to be The River Saint Croix intended by the said Treaty of Peace; and in the same declaration to insert a description of the same River and particularize the latitude and longitude of its mouth, and of its source, pursuant to the true intent and meaning of the said fifth article of the Treaty of Amity, Commerce and Navigation between his said Majesty and the said United-States.

And the said Undersigned Agent, in behalf of His said Majesty, saving and reserving to himself all just right to be heard in further

elucidation, proof and support of His said Majesty's Claims, before this Honorable Board, at such time and place as they shall think fit to appoint, pursuant to the said fifth Article of the said treaty of Amity, Commerce and Navigation, if the same shall be expedient;—humbly prays as he hath herein before prayed.

WARD CHIPMAN

Agent to His Britannic Majesty

4th October 1796.

V. The Surveys

We have seen that at Halifax the two original commissioners, Barclay and Howell, in order to avoid the entire loss of a season, consented in their "individual" capacity to "advise" the agents to proceed with the surveys, and that the agents took steps to that end.¹

Proceedings at
St. Andrews

On the morning after his arrival at St. Andrews, Mr. Chipman sent to Mr. Sullivan, who was already on the ground, a letter, written on the preceding day, in relation to the surveys and their further prosecution.² In this letter Mr. Chipman stated that he had communicated to the lieutenant governor of the province, "under whose direction" he proceeded in the business, the result of the proceedings at Halifax, and that, the lieutenant governor having approved what he had done, he had engaged Thomas Milledge, of the province of Nova Scotia, as the surveyor to assist in the survey and description of the Schoodiac, and Isaac Hedden, of Fredericton, New Brunswick, to assist in the survey and description of the Magaguadavic; that the former with a proper number of attendants was present and ready to proceed, and that the latter with his attendants was hourly expected. Mr. Chipman further stated that, prior to the meeting at Halifax, he had engaged Mr. Lambton, of Fredericton, a "scientific man," to assist in ascertaining the latitude and longitude of the mouth and the source of the river which should be determined to be the St. Croix, but that, military employments having subsequently obliged Mr. Lambton to repair without delay to Great Britain, he had written to David Owen, of Campobello Island, who was amply qualified for the duty if his health would permit him to undertake it; and that, should Mr. Owen be unable to attend, he would not object to Mr. Webber's continuing his observations for fixing the latitude and longitude of the mouth of the Magaguadavic and also of the Schoodiac, and that, as proper instruments would be procured from England to ascertain the

¹ *Supra*, 21.

² Mr. Chipman to Mr. Sullivan, St. Andrews, Sept. 22, 1796, MS. Miscellaneous Papers and Correspondence; MS. Journal, II.

latitude and longitude of the source of the river which should be decided to be the St. Croix, the latitude and longitude of its mouth, if objections to the present proceedings should arise, might thereafter be ascertained with little trouble and at a very trifling if any additional expense. In conclusion Mr. Chipman proposed that the surveyors before they proceeded should be sworn to the faithful discharge of their duty and to make an accurate survey of the rivers on which they should be employed, following such directions as should be given them by the agents on behalf of the respective governments.¹

Accompanying the foregoing letter there was a draft of a proposed memorial to the full board, referring to what had taken place at Halifax on August 27th, and to what the agents had since done, and asking that the papers might be filed with the secretary and entered on the journal, and that the agreement and all that had been done under it be sanctioned and ratified as being in fulfilment of the requirements of the treaty.

On September 23d, Mr. Sullivan answered that, pursuant to the agreement at Halifax, he had at hand on the 20th instant two surveyors, each with four men, to proceed with the survey of the two rivers; that the provisions for one party were nearly ready and those for the other were in course of preparation; that it would be most convenient to him to supply the party going on the Magaguadavic, as his provisions were there; that he would propose Mr. Peters for the Magaguadavic and Mr. Chaloner for the Schoodiac. He considered that a conference on the subject would be necessary. Mr. Webber, he added, was already at the mouth of the Magaguadavic, making observations whenever the clouds would allow, and was anxious to have some scientific gentleman from Great Britain with him. With his letter to Mr. Sullivan, or in the subsequent conference, Mr. Chipman submitted a draft of his proposed instructions to the surveyors of the Schoodiac. These instructions are addressed to Thomas Milledge, Esq., appointed on behalf of his Britannic Majesty, and William Chaloner, appointed on behalf of the United States, as "artists to make a survey and description of the River Schoodiac."

¹ This letter was sent to Mr. Sullivan with the following line:

"Mr. Chipman presents his respectful Compliments to Judge Sullivan and would have called on him last Evening had he not supposed The Judge too much fatigued with his excursion—Mr. C. takes the liberty of inclosing a letter he prepared yesterday, and will do himself the honour to call on Judge Sullivan in the course of this morning.

Friday 23^d Sept^r."

Mr. Sullivan, in a letter of September 24th, accepted the instructions prepared by Mr. Chipman for a survey of the Schoodiac waters or lakes, with the suggestion that the part relating to the Island of St. Andrews be left out, and that it be inserted in the orders for the survey of Passamaquoddy Bay. At the same time Mr. Sullivan presented a draft of "additional instructions" on his own part as to the survey of the Schoodiac, and a draft of instructions, addressed to John Peters, Jr., appointed on the part of the United States, and Isaac Hedden, appointed on the part of his Britannic Majesty, as "Artists to make a Survey and Description of the River Magadadawick."

Mr. Chipman, in a letter dated eight o'clock p.m. on September 25, 1796, referring to the "additional" instructions regarding the Schoodiac, said he did not expect that Mr. Sullivan, after accepting the draft with the Island of St. Andrews left out, would "interweave" with his additional instructions further "objections" to the original draft, and he then proceeded to point out and discuss the passages in the additional instructions which he conceived to be inconsistent with the instructions.

Replying on September 26th, Mr. Sullivan explained that it was his understanding of the agreement made at Halifax that each agent should give such orders for the survey of the Schoodiac and also of the Magaguadavic as he should desire; that, when he read Mr. Chipman's instructions, he was not a little surprised to find that they comprehended in the survey of the Schoodiac not only all that part of Passamaquoddy Bay which could be of advantage to the British claim but also certain islands in what Mr. Chipman called the "river," and others yet in Oak Bay, which, according to his own averments, could not be considered as a part of the river; that the directions given as to the distance and bearing of the islands, the appearance of the mountains, high hills, shores, and other islands at a distance, were no parts of the survey of the river, but evidently were given with a view to fix an idea and raise a presumption that among those islands was the one on which M. De Monts made his winter quarters in 1604, and which he called St. Croix Island. Mr. Sullivan said he did not know whether a fact of that kind could have any weight in the decision, but if it could have, the islands clearly ought to be surveyed by the same artists. By the Halifax agreement, declared Mr. Sullivan, Mr. Chipman had a right to call what waters he pleased the Schoodiac, but, if the agent of the United States should agree to the accuracy of the description, he would betray his trust. The commissioners would, said Mr. Sullivan, decide on all the evidence laid before them, independently of the names which the agents

gave to the rivers; and, if one agent called the branch which he wished to have surveyed the Passamaquoddy, and the other called the waters he ordered to be surveyed the Schoodiac, was there more impropriety in the one than in the other? The idea that the additional orders were to be considered as objections to the original orders seemed to have no foundation; but on the supposition that the instructions were wholly acceptable, except as regarded the islands, he was ready to obviate this difficulty by adhering to the original agreement for an immediate survey of "the Rivers," and to have later a description of the Bay, and of the islands in it and within sight of it, with their appearance, distance, and relation one to another, made by artists appointed for that purpose. Mr. Sullivan said he still wished to add a supplementary instruction in both orders "that you keep a fair field-book of all your works and return the same with your plan." In conclusion, he offered to confer with Mr. Chipman immediately.

Promptly replying, Mr. Chipman, while accepting the proposal of a conference, also accepted Mr. Sullivan's views in regard to the nature and effect of the instructions to the surveyors. His letter was as follows:

St. ANDREWS, 26th Sep^r. 1796.

SIR: I am this moment honored by yours of this date. We are perhaps both of us too far anticipating on the present occasion, the merits of the principal question to be decided by the Commissioners. I conceived it my duty to make the representation contained in my letter of the 25th inst. and I am still persuaded of the propriety of the measure. As we differ in sentiment I do not wish to delay the survey but consent to the Surveyors proceeding according to the Instructions as they now stand, and shall be satisfied with laying before the Commissioners, when the Board shall be formed, a Journal of our Proceedings.

I perfectly approve of the supplementary Instruction you propose, and of the mode which you suggest for obviating my objection to the form of the Oath.

I will do myself the honor of conferring with you at ten this morning as you propose.

I have the honor [etc.]

WARD CHIPMAN

The Hon^{ble}. JAMES SULLIVAN, Esquire,
Agent &c.

Mr. Chipman's instructions to the surveyors in regard to the survey of the River Schoodiac were as follows:

Chipman's in-
structions as to
the Schoodiac

To THOMAS MILLEDGE Esq^{re}. appointed on behalf
of His Britannic Majesty, and WILLIAM CHALONER
Esq^{re}., appointed on behalf of The United States,
Artists to make a Survey and Description of the
River Scoudiac.

GENTLEMEN: His Britannic Majesty having appointed Ward Chipman Esquire his Agent to appear before Commissioners constituted pursuant to the fifth article of the Treaty of Amity, Commerce and Navigation made between His said Majesty and The United States of America, on the nineteenth day of November 1794. Which Commissioners are to decide what River was by the Commissioners at Paris, who concluded the Treaty of Peace between the same powers in the year 1783, truly intended under the name of the River Saint Croix mentioned in the said Treaty of Peace;—by which appointment the said Ward Chipman is to manage the business on behalf of his said Majesty before the said Commissioners. And the President of The United States having appointed James Sullivan Esquire Agent to the said States in the same controversy to Manage the business on their behalf before the said Commissioners. And the said Agents having agreed that you shall survey the River called The Scoudiac, with an intent that the situation extent and appearance thereof shall be lay'd before the said Commissioners on a map carefully formed from an accurate Survey. And that the said Agent for His Majesty shall give such orders to you the said Artists appointed to survey the said River as he shall choose to give, and that the said Agent of the States shall make no objections to the same, but may add any other orders which he may think proper to be added; and the said Agents having further agreed that the said Agent for the States shall give such orders to other Artists by the said Agents appointed to survey the River Magaguadavic, as he shall choose to give, to which orders no objection shall be made by the said Agent for His Majesty;—But that he may add any other orders which he may think proper to be added.

THEREFORE, in pursuance of the premises—the Undersigned Agent, on behalf of His said Majesty, hereby gives to you the following Instructions for a Survey of the said River Scoudiac, it's source, and dependencies, viz.

1. You are to commence your survey on the eastern shore at the southernmost part of Saint-Andrew's point, lying to the southward of the town of Saint-Andrew's; and on the western shore at a point lying due west from the said place of beginning on the eastern shore, taking care to fix some mark or stake at the said places of beginning.
2. You are to proceed to make a correct and true survey following the courses of the shore northward on each side to the head of Oak-point-Bay, so called, making a true survey thereof, noting the mouths of all streams of water that fall into the same Bay.
3. You are to make a particular survey and Description of all Islands lying between the Devil's head, so called, and the said places of beginning.
4. You are particularly to note the situation and appearance of two small Islands, lying a little below, or to the southward of the said Devil's Head, marking the exact distance of each of the same Islands from the shore on each side, and from each other, ascertaining the depth of Water between the same Islands, between the parts of the shores thereof lying opposite to each other,

ascertaining also the distance between the northernmost of the said Islands and the centre of the River where it emptieth itself at the said Devil's head into the said Bay.

5. You are to note the appearance and bearings of any mountains or high-hills on the shores on each side of the said Island last mentioned, which rise eminent above the others, and particularly the shape, bearing and distance of the said Devil's head.
6. You are particularly to note all the Islands lying in the said Oak-point-Bay, their situation and height relatively to each other.
7. You are to proceed to make an accurate and correct Survey of the said river Scoudiac from the said places of beginning to the Furthestmost western source or spring thereof, where the Waters from the westward first empty themselves into the said River.
8. In the course of your Survey you are to note the mouths of all streams of Water, not less than twenty five Links or one rod wide at their mouths, that fall into the said River on either side thereof.
9. You are to make a correct Survey of all the Lakes between the mouth of the said River and the said western source thereof, marking the exact situation of all the Islands in the said Lakes, or either of them.
10. You are to ascertain the depth of Water at distances not greater than half a mile from each other, and also note the force of the current from the first Falls or Rapids in the said River to the said western source.
11. You are to ascertain the width of the said river from the said place of beginning to the said Western source thereof, as nearly as the same may be done.
12. As it is of great importance that the above Survey should be accurately protracted, You are to make a true and exact Traverse-Table of every Course and distance run, in order to check any error that may happen in the protractions.
13. You are to compleat the said Survey and a Map thereof, with all practicable accuracy, and with all convenient speed.

WARD CHIPMAN

Agent on behalf of His Britannic Majesty

Mr. Sullivan's additional instructions were as follows:

The Undersigned Agent of The United States of America, for the purposes herein before expressed, and pursuant to the agreement of the afore-named Agents herein before recited, agrees to the orders for a survey of the said River Scoudiac as given by the Agent of His Britannic Majesty, and adds thereto for your attention and execution, the Instructions following to wit.

Sullivan's additional instructions

First. That as the Agent for His said Majesty has in the third—fourth, fifth and sixth articles in the foregoing Instructions, directed you to survey all the Islands lying below the place called The Devil's head, and all the Islands in the Scoudiac or Passamaquody-River, below the Waters called Oak-Bay, and

more particularly two Islands a little below or to the southward of said place called The Devil's head, the distance and bearings of the same two Islands from each other, the appearance and bearings of the Mountains, High-Hills or Shores on each side the northernmost of the said Islands, and the appearance of the Islands within Oak-Bay from the same. The Agent for the said United States Knowing that the same two Islands are open to and in sight from the same Bay of Passamaquody; the survey of which is suspended for the present, but is to be accurately made hereafter, under the orders of the said Agents, or by order of the Commissioners, and supposing that the survey of the same Islands may then be proper and necessary, in order to take the appearance and bearings of other Islands, Waters, Places and Shores from them, which can be done only in a survey of the whole Bay, and ought to be surveyed by the same Surveyors who shall survey and describe on a Map all the Islands in and Shores and Banks which form the same Bay, and the Islands which are within the mouths of Rivers, but open in sight from the same Bay. The Agent of The said United States agrees to the said orders given to you by the Agent for His said Majesty, upon this express condition—That the same Islands, as well as the Islands in Oak-Bay, and the point of S^t. Andrews lying to the southward of the town of S^t. Andrews, and the western shore lying west from the said place of beginning, which are no part of the shores of the River aforesaid, shall be again surveyed, the appearance of the Islands from the shores, and the appearance and bearings of the hills shores &c^a., from them or either of them, accurately taken by the Surveyors who shall hereafter survey the said Bay of Passamaquody and the Islands therein, under the orders of the said Agents or by the order of the Commissioners if either party shall require it.

2. That as the said River called The Scoudiac, from the Bay of Passamaquody to the place where the tide ceases to flow, is a part of the River called Passamaquody, and has for some years past been indifferently called The Scoudiac, and Passamaquody as far up as the head of the tide.—And it appearing to be the intention of the said Agent of His said Majesty, that you shall, under these orders, after you shall have surveyed the River called The Scoudiac to the head of the tide, survey certain Lakes, or ponds lying to the southward and westward of the River Passamaquody with their intermediate Brooks and connecting Waters;—and it being as the Agent for the said States conceives, rendered necessary by a survey of the said Ponds or Lakes to have the said River Passamaquody surveyed to it's source. THEREFORE,—
3. The Agent of the said States instructs you as follows,—

That when you have surveyed the River Scoudiac or Passamaquody from it's mouth to the head of the tide under the aforegoing orders of the Agent of His Britannic Majesty; That You proceed to a survey of the River Passamaquody, from the said place called The Devil's-head up to the place where the

Waters of the said Ponds or Lakes run into the said River Passamaquody: being about as far above the head of the tide, as the head of the tide is above the point now called S^t. Andrews—and that

You survey the same in manner above mentioned.

4. That You proceed on the river Passamaquody as it comes to the abovementioned confluence from a northeasterly course up to a stream which comes in on the easterly side of the same called Keenose. That You survey, measure, and note that stream as to it's width depth, and quantity of water at it's mouth.
5. That You then proceed to a survey of the said river Passamaquody, to certain Waters called by the natives—Omquemenkeeg, and noted by that name on a map compiled from a survey of Samuel Titcomb in the year 1794, or by whatever other name the said Lake is called, and which empties it's waters to the sea by the said river Passamaquody.
6. That You ascertain the width of the said River, and once in every half mile at least, take an accurate account of it's depth and the force of it's current, that the appearance of the same river may be had on a map which you shall compile from your surveys.
7. You will carefully survey the Banks and Shores of the Lake with it's dependencies, taking the depth of it's Waters in the various parts of it, and noting the Islands within it.
8. On the northerly part of the same Lake last-mentioned, you will find Waters leading from a Long-pond or Body of Waters, which the Agent for the said States from the plan of the said Titcomb calls Long-Pond. These Waters You will carefully survey by measuring each of the shores from the said Lake to their most northern extent, taking the width and depth of the said Waters, and noting any Falls or Islands which may be therein.
9. You will survey another Lake, which from the said Titcomb's Map is called North-Lake, the Waters of which issue into the Lake beforementioned by the name of Omquemenkeeg. The shores of the said North-Lake, you will accurately survey, and measure, on all it's parts, and take the depth and width of it's Waters, and note and measure at their mouths all Brooks and Rivers which run into it.
10. You will survey the stream by which the Waters of the said North-Lake pass into the other called Omquemenkeeg with the same exactness, and in the same manner as you are instructed to survey the other rivers, Thereby ascertaining the width—depth—and current of the same.
11. When you shall survey the Waters which form a connexion between the Lakes on the southward and westward of the Passamaquody-River—You will carefully take the exact width and depth and currents of the same.
12. When you shall have surveyed pursuant to the aforegoing orders of the said Agent of His Said Majesty, the Ponds or Lakes aforesaid, You will find the shortest Carrying-place from the said Waters to the River Penobscot, and measure the distance

between them, and note the place or part of the river you come to, as nearly as you can gain it from enquiry.

13. You will every morning before you proceed any further in business compare your minutes of every kind which you shall have made the preceding day, and if there shall happen to be any disagreement upon the courses, distances, widths or depths of the river, or waters, upon the appearance or bearing of any hill, mountain, shore or islands, You will re-survey and correct the same immediately; And if you cannot on such re-survey agree, you will in the presence of the Chainmen & attendants note the same disagreement, and represent the same on the map or plan which you shall return of your Surveys.

JA SULLIVAN

Agent of The United States

Mr. Sullivan gave a further additional instruction as follows:

You will keep a fair Field-Book and Journal of all your Works, and return the same with your plan. Sullivan's further additional instructions

JA SULLIVAN

Agent of The States

Mr. Sullivan's instructions to the surveyors as to the survey of the Magaguadavic were as follows:

To JOHN PETERS junior, appointed on the part of The United States of America, and ISAAC HEDDEN Esquire appointed on the part of His Britannic Majesty, Artists to make a Survey and Description of the River Magadadawick. Sullivan's instructions as to the Magaguadavic

GENTLEMEN: His said Majesty having appointed Ward Chipman Esquire, His Agent to appear before Commissioners constituted pursuant to the fifth article of the Treaty of Amity, Commerce and Navigation made between His said Majesty and The United States of America on the nineteenth day of November 1794. Which Commissioners are to decide what River, was by the Commissioners at Paris who concluded the Treaty of peace between the same powers in the year 1783, truly intended under the name of The River S^t Croix mentioned in the said Treaty of Peace.

By which appointment the said Ward Chipman is to manage the business on behalf of His said Majesty before the said Commissioners. And The President of The United States having appointed James Sullivan Esquire Agent for the same States in the same Controversy to manage the business in their behalf before the said Commissioners. And the said Agents having agreed That You shall Survey the river called—The Magadadawick, with an intent that the situation, extent and appearance thereof be lay'd before the said Commissioners on a Map carefully formed from an accurate

Survey, And that the said Agent for The United-States shall give such orders to you as Artists appointed to survey the said river Magadadawick, as he shall choose to give, And that the said Agent for His said Majesty shall make no objections to the same, but may add any other orders which he may think proper to be added.

And the said Agents having further agreed that the said Agent of His Majesty shall give such Orders to other Artists by the said Agents appointed to survey the River Scoudiac so called, as he shall choose to give, to which no objection shall be made by the Agent on the part of The United States, but, that he may add any other orders which he may think proper to be added.

THEREFORE, In pursuance of the Premises, The Undersigned Agent on behalf of The United States hereby gives to You the following Instructions for the Survey of the said River called The Magadadawick, it's Sources and dependencies, viz.

1. You will begin at a point about half a mile northerly of the place where Professor Webber has his observatory, which forms a southerly point of the Cove where one Campbell lives; and one half a mile on the southerly side of the mouth of the river which is formed by a high head opposite to the point aforesaid.
2. You will survey then from those places of beginning, where you will place notorious monuments, and survey both banks of the river as high as the tide flows.—On which Survey you will take the width of the Water at high-water-mark, and note as exactly as you can, the usual rise of the tide. You will take the depth of the water up as far as the tide flows.
3. You will carefully take the bearings and distances of all High-hills on the sides of the river, as far up as aforesaid, and note the bearings of each Island in the Bay of Passamaquody, from the mouth of the river, more especially the outermost of two Islands lying northwest therefrom.
4. When You come to the head of the Tide, you will survey and fully describe the Fall whereon the River falls down into the tide.
5. You will survey a certain Brook, whereon the saw-mill of Jonathan Wallis stands, on the other side of the bason into which the river falls at the head of the Tide, You will survey accurately the same Brook for the space of one mile, taking it's courses and measuring it's fall into the tide.
6. You will then proceed up the river four miles, or near that distance; above the Falls, you find a river coming from the north-east into the Magadadawick, which conveys to that river the waters of a large Lake about fourteen miles long. You will accurately survey that River and Lake taking the width and depth of water in the river, and by measuring the shores of the pond, ascertain its bigness, and by measuring in its various parts, ascertain the depth of it's Waters. You will also measure the distance from said pond to the harbor Etang, which you will find to be less than one mile.

7. Eighteen miles above the first is the second Fall of Water on the river; That Fall is to be particularly noted.
8. You will proceed up, surveying the river, and taking it's width and depth all the way from the mouth until you come to the Forks, which are about twelve miles above the Falls Last mentioned. These Branches you will survey in manner as before expressed to the ponds or Lakes from which they issue, or so far as to find the source of each of them.
9. These Surveys you will make so as to connect them with those of the river below, for the purpose of forming one compleat map, representing the whole from the Bay as far up as you shall extend your Surveys.
10. When your survey is over you will with great accuracy form and exhibit a map of the river Magadadawick according to your survey, noting thereon with precision, the various widths and depths of the river, as taken in your survey, and of the Lakes and Streams, which are connected with it.
11. When you are engaged in your Survey, you will on every morning before you proceed to any other business, compare your minutes of what shall have been done the preceding day; and should there happen to be any disagreement in them, you will make a re-Survey so as to see where the mistake may be; and if you cannot finally agree, you will in presence of your chainmen &c^a., note the difference, and represent it on your map.

JA SULLIVAN

Agent to the United States

Sept^r. 24th 1796.

Mr. Sullivan gave to the surveyors of the Magaguadavic the following additional instruction:

You will keep a fair Field-Book and Journal of all your Works, and return the same with your plan.

Additional
instruction

JA SULLIVAN

Agent of The States

Mr. Chipman's "additional instructions" as to the survey of the Magaguadavic were as follows:

The Undersigned Agent of His Britannic Majesty, for the purposes herein before expressed, and pursuant to the agreement of the aforementioned Agents herein before recited, agrees to the orders for a Survey of the said river Magadadawick, as given by the Agent of The United-States, and adds thereto for your attention and execution, the Instructions following, to wit.

Chipman's additional
instructions
as to the Maga-
guadavic

- 1.—You will ascertain the names of the two Islands mentioned in the third Article of the foregoing Instructions, and whether they or either, and which of them are situated in or near to the mouth of any and what Stream or River, And You will also ascertain the

name of each Island, of which you shall take the Bearings, pursuant to the said third Article.

- 2.—In the course of your Survey You are to note the mouths of all Streams of Water not less than twentyfive links of the Chain or One rod wide at their mouths, which fall into the said River on either side thereof, or into either of the Branches of the said River above the Forks: And you will accurately survey all such Streams, being of that or any greater width.
- 3.—You will make a correct survey of all Lakes with which any of the Streams which you shall survey communicate, in the manner mentioned in the sixth article of the foregoing Instructions, marking the exact situation and dimensions of all the Islands in the said Lakes or either of them, or in any Lakes you shall survey.
- 4.—As it is of great importance that the above Survey should be accurately protracted, You are to make a true and exact Traverse Table of every course and distance run, in order to check any error that may happen in the Protractions.

WARD CHIPMAN

September 24th 1796.

Agent to His Britannic Majesty

With reference to the instructions given by the agents to the surveyors, the Board, on October 4, 1796, adopted the following resolution:

Resolution of the Board	<i>Resolved</i> —That the Surveys mentioned in the said Papers delivered in by the Agents jointly, be deemed as if commenced by the order of the Board; and that the same be continued and compleated, according to the Instructions from the Agents as contained in the said Papers.
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We have seen that Mr. Chipman, in his letter of September 22d, proposed that the surveyors should be sworn to the faithful discharge of their duties, under the directions of the agents.

Oaths of surveyors	Mr. Sullivan, writing on the 24th of September, said that, although the propriety of swearing the surveyors and the chainmen was very obvious, he had not previously replied to that part of Mr. Chipman's letter because he wished to extricate himself from an embarrassment. He then explained his embarrassment and proposed to meet it as follows:
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From your proposals for a survey I understand that you do not propose to extend the claim which you advocate to that part of the territory on the west side of the River which receives the waters of the Scoodiac Lakes, as well as those of the Passamiquody River and where John Brewer Esquire who is an acting Magistrate under Massachusetts, lives. I am willing therefore, in order to avoid all dissension, that Colonel Brewer shall administer the oaths to the party who shall survey the Schoodiac and Passamiquody waters; and that the party who is to survey the Magaquadavick shall be sworn on the East bank of that River by any Magistrate of the Province of New Brunswick who has authority to administer an

oath there. On this Idea I am ready to agree to the forms of the Oaths.

Mr. Chipman replied that, when he proposed that the surveyors should be sworn, he did not imagine that any objection could arise to the administration of the oaths at St. Andrews, the place to which the two original commissioners had adjourned, and where it had been agreed to meet in order to make the necessary arrangements to enable the surveyors to proceed. Had it been agreed, he said, to meet on the western shore opposite St. Andrews, he should not have objected to the administration of the oaths by a magistrate there, as he did not conceive that the claims on either side could be in this way affected. As a question had been raised, he could not assent to the method proposed by Mr. Sullivan, but, in order to obviate all difficulties, would propose that the surveyors and chainmen employed by Mr. Sullivan on the Schoodiac and Magaguadavic Rivers should be sworn on the western shore, and that the surveyors and chainmen employed by himself should be sworn at St. Andrews.¹

Mr. Sullivan thought that this proposal did not heal the difficulty which he wished to avoid. As they were proceeding by voluntary agreement, independently of any judicial, compulsory process, it was, he said, necessary to proceed with caution; but he was ready to agree that the oaths of the persons employed by Mr. Chipman should be administered by a magistrate at St. Andrews, provided the agents signed an agreement that this should not have any influence on the question at issue. He concluded with the remark that there was no necessity for such an agreement in the case of his own surveyors, because he supposed the British claim did not question Colonel Brewer's jurisdiction at the place where he lived. He was, however, ready to sign a similar agreement as to the latter.²

On this basis the agents concluded the following agreement:

The Undersigned Ward Chipman Agent of His Britannic Majesty on the Question of the Saint-Croix boundary, and James Sullivan the Agent of The United States of America, in order to prevent unnecessary discussions in the business, agree—That the Surveyors and Chainmen employ^d by the Agent for His Majesty shall be sworn to the faithful performance of their duty according to the form agreed upon by the said Agents before any Acting Magistrate in St Andrews, and that the same oath shall be administered to the Surveyors and Chainmen which are employed by the Agent of The United States by John Brewer Esquire, who is an Acting Justice of the peace on the west side of the Scoudiac under the Government of Massachusetts. And that the Acts of said Magistrates, or either

Agreement as to
administration
of oaths

¹ Mr. Sullivan to Mr. Chipman, Sept. 24, 1796.

² Ibid.

of them, shall never be construed as a concession of either party as to any point in the merits of the Question before the Commissioners.

In Witness of which we have subscribed and interchanged this agreement the twentyfourth day of September 1796.

WARD CHIPMAN

Agent For His Britannic Majesty

JA SULLIVAN

Agent For The United States of America

There still remained a question as to the form of the oaths, the form as originally drawn by Mr. Sullivan having given rise to discussions of various points, geographical and otherwise. At length Mr. Sullivan suggested that, following the principle applied to the instructions, all objections might be obviated by swearing the surveyors "well and truly to survey according to the orders and instructions delivered to them by the Agents." This suggestion Mr. Chipman "perfectly approved,"¹ and the following form was agreed upon:

Agreement as to
form of oaths

You swear That You will well and truly execute the Orders given you by the Agent for His Britannic-Majesty, and the Agent for The United-States of America, according to the best of your skill and ability, without any regard to the interest of either party; and that in forming plats of the surveys by you made, you will faithfully and impartially delineate your surveys, with a true and upright intention, that the same plats with the descriptions which they may contain, shall give a full, true and impartial representation of the Rivers—Waters—Lands—Islands—Shores—Hills, and Rocks which you shall survey, and which you shall by the said Agents be ordered to survey.

So help you God.

The following form was adopted for the oath of the chainmen:

You swear, That in assisting the surveyors under whose direction you are employed by the Agent of His Britannic-Majesty, and the Agent of The United-States, You will act truly and faithfully in all your proceedings, and well and faithfully obey all such orders as shall be given you by the said surveyors.

So help you God.

The surveyor's oath was administered to John Peters, Jr., and William Chaloner, surveyors on the Magaguadavic, by John Brewer, Justice of the Peace, in Washington County, Massachusetts, on September 26, 1796.

Administration of
the oaths

The same oath was on the same day administered to Thomas Milledge, surveyor on the Schoodiac, by Jno. Curry, Justice

¹ Mr. Sullivan to Mr. Chipman, Sept. 26, 1796; Mr. Chipman to Mr. Sullivan, same date.

of the Peace, at St. Andrews; and to Isaac Hedden, surveyor on the same river, by Robert Pagan, one of the judges of the Court of Common Pleas.

The chainmen's oath was administered by Brewer on September 26th to Henry Dorraty, Samuel Phillips Clarke, James Peters, Jonathan Longfellow, Jr., Enoch Longfellow, Isaac Longfellow, William Albe, and Josiah Hitchins; and by Curry or Pagan, on that or subsequent days, to Joseph Morton, Bethel Walton, Eri Walton, Cephas Walton, John Segee, Joseph Segee, and Paul Oliver.

On September 29, 1796, the agents sent a joint letter to Robert Pagan requesting him to supply Thomas Milledge and William Chaloner, surveyors on the Schoodiag, and John Peters, Jr., and Isaac Hedden, surveyors on the Maguadavic, "with such articles from time to time as they shall jointly apply for to you in writing, as necessary to enable them to proceed in their survey"; and on the same day they addressed a joint letter to the surveyors, as follows:

Supplies for the
surveyors

All the Articles of provisions and other necessities which we could anticipate your want of, have been provided for your accommodation while you are employed in surveying under our directions, but should you stand in need of any further supply of any articles to enable you to proceed, We have given directions to Robert Pagan Esquire of this place to furnish You therewith upon your joint requisition to him in writing for that purpose.

In case you should find it necessary in order to expedite your survey to employ at any time an Indian in conveying your provisions or executing messages or any other service, you are at liberty to employ one, allowing him at a rate not exceeding half a dollar per day and His provisions.

We have seen that at Halifax the two original commissioners, Barclay and Howell, in order to avoid the entire loss of a season, consented in their "individual" capacity to "advise" the agents to proceed with the surveys, and that the agents before and after their arrival at St. Andrews took steps to that end.

Ratification of
Halifax agreement

On September 30th Mr. Chipman sent to Mr. Sullivan fair copies of the papers in which their proceedings up to that time under the Halifax agreement were recorded, to be laid before the commissioners as soon as the board should be formed, and he also enclosed for Mr. Sullivan's consideration a form of petition to the board.¹ The papers accompanying Mr. Chipman's letter, apart from the form of petition,

¹ Mr. Chipman to Mr. Sullivan, Sept. 30, 1796.

consisted of copies of the correspondence exchanged between himself and Mr. Sullivan, together with the annexed documents.

Mr. Sullivan, while concurring in the view that the commissioners should be asked to sanction and ratify the Halifax agreement and what had been done under it, was inclined to think that there should be some previous proceedings and that the petition ought to be adapted to them. After the various commissions had been produced and recorded, Mr. Sullivan said he should file a memorial suggesting the River Magaguadavic as the true St. Croix, while Mr. Chipman might file a memorial suggesting some other river. He would then be ready to join in a petition for the sanction of what had been done, it being his view that the Halifax agreement between the agents could not be supposed to be understood by the commissioners before the agents' suggestions of the boundary were filed. The letters exchanged between the agents might, he thought, be used by the agents in case of controversy for the purpose of explaining their intentions; but he questioned the propriety of laying them before the board, as they could never be a part of the record of the board's proceedings.¹

Mr. Chipman, while generally concurring in what Mr. Sullivan had said, observed that the only point of difference related to laying before the board the letters exchanged in carrying out the Halifax agreement. He conceived this to be necessary not only that the board might fully understand what had been done, but also in order that he should not appear to acquiesce in some things which he still thought objectionable and from which unfavorable inferences might possibly be drawn; and he particularly invoked the statement made in Mr. Sullivan's letter of September 24th, that "as we now proceed by voluntary agreement independent of any judicial compulsory process it is necessary to proceed with caution." He conceived it to be peculiarly necessary that the letters respecting the additional instructions to the surveyors of the Schoodiac should be laid before the board and be recorded in the journal, for the very reason stated by Mr. Sullivan on that occasion, to the effect that he should betray the trust committed to him if he should agree to instructions in which certain waters were called the River Schoodiac, which he conceived never to have been known by the name of a river before the peace of 1783. He was himself in a similar position in regard to Mr. Sullivan's calling a river by the name of Passamaquoddy, which he conceived had never been known by that name before 1783.²

Mr. Sullivan having been convinced by this argument, Mr. Chip-

¹ Mr. Sullivan to Mr. Chipman, Sept. 30, 1796.

² Mr. Chipman to Mr. Sullivan, Oct. 1, 1796.

man laid before the board at its meeting on October 6, 1796, the following memorial, bearing the date of the preceding day:

To the honourable THE COMMISSIONERS appointed pursuant to the fifth Article of the Treaty of Amity, Commerce and Navigation between His Britannic-Majesty and The United-States of America.

The Undersigned Agent for His Britannic-Majesty has the honour to lay before this honorable Board, the inclosed papers from N^o 1, to N^o 12, inclusive, comprehending the whole of the Correspondence between the Agent of The United States and himself since the 20th of September last. Which correspondence he conceives to be necessary to explain the circumstances attending the execution of the agreement made between him and the Agent for The United-States respecting the Surveys of the Rivers Scoudiac and Magaguadavic, for the reasons which will appear in the same papers. And he has further the honor to request that the same may be filed, together with the papers which accompanied the joint Memorial of the agents on behalf of their respective Governments, presented on the 4th instant.

The board ordered the secretary to deliver a copy of this memorial to the agent of the United States; and at a meeting of the board on October 7th, Mr. Sullivan presented a memorial saying:

The Undersigned Agent of the said States, having seen the Memorial of the Agent of His said Majesty, for having the Letters which have passed between the said Agents filed with the Secretary, and that the same shall become a part of the record of the proceedings under the Commission, now agrees to the propriety of the request, in confidence that the said Papers contain all the Correspondence which has been had.

The board then ordered the papers to be filed.¹

At the fifth meeting of the commissioners, which took place on the 8th of October, a joint memorial praying for the survey and mapping of Passamaquoddy Bay was submitted, reading as follows:

Survey of Passamaquoddy Bay

To the Honorable THE COMMISSIONERS appointed pursuant to

¹ The papers were designated by indorsements on them, as follows:

- N^o. 1. Copy of a Letter from M^r. Chipman to M^r. Sullivan, 22^d Sept^r. 1796.
- N^o. 2. Copy of a Letter from M^r. Sullivan to M^r. Chipman, 23^d Sept^r. 1796.
- N^o. 3. Copy of a Letter from M^r. Sullivan to M^r. Chipman, 24th Sept^r. 1796.
- N^o. 4. Copy of a Letter from M^r. Chipman to M^r. Sullivan, 24th Sept^r. 1796.
- N^o. 5. Copy of a Letter from M^r. Sullivan to M^r. Chipman, 24th Sept^r. 1796.
- N^o. 6. Copy of a Letter from M^r. Sullivan to M^r. Chipman, 24th Sept^r. 1796.
- N^o. 7. Copy of a Letter from M^r. Chipman to M^r. Sullivan, 25th Sept^r. 1796.
- N^o. 8. Copy of a Letter from M^r. Sullivan to M^r. Chipman, 26th Sept^r. 1796.
- N^o. 9. Copy of a Letter from M^r. Chipman to M^r. Sullivan, 26th Sept^r. 1796.
- N^o. 10. Forms of Oaths.
- N^o. 11. Copy of a Letter to M^r. Sullivan from M^r. Chipman, & M^r. Sullivan's answer, 30th September, 1796.
- N^o. 12. Copy of a Letter from M^r. Chipman to M^r. Sullivan 1st October 1796.

the fifth Article of the Treaty of Amity, Commerce, and Navigation between His Britannic Majesty and The United States.

The Commissioners having condescended to meet on the Lands in controversy, and to view the Waters and Bay of Passamaquoddy, it's Shores, and the Islands in the same, and particularly to attend to the Islands, Hills etc. shewn to them by the Agents, and having ordered Surveys and Maps of the two rivers mentioned in the separate memorials of claim filed by the said Agents,

The Agent for his said Majesty, and The Agent for the said States, have the honour jointly to represent that in their opinion it will be necessary in order to understand the evidence which may be offered on the trial and to particularize the River which shall be decided to be The Saint-Croix intended &c^a. That there shall be an accurate Map of the Bay of Passamaquoddy—the Islands therein, and of the connection of the Rivers with it.

Wherefore they propose that if the honorable Board shall consider such map of the Bay to be necessary, an order may be passed for each of the said agents to employ one able Artist with Assistants; and that the two Artists so employed shall jointly compile an accurate Map of the said Bay, exhibiting it's Islands it's Shores, the Mouths of the Streams issuing into it, and the appearance of such Hills as either Agent, or any person by him appointed shall require, and generally on such Map to represent truly all Bays, Waters, Creeks, Islands, Hills—and other objects, as either party shall direct.

The said Agents have the honor further to propose that the Board will fix on a Scale for the Maps, and that the same shall be amply large to describe the minute parts of the Bay and of the Rivers.

W. CHIPMAN
Agent &c.
JA SULLIVAN
Agent &c.

October 8th 1796.

On the foregoing memorial the board made the following orders:

That the Agents be authorized to cause Surveys to be made conformably to the above Memorial.

ORDERED—

That the Maps of all Surveys to be made and comprehending the Surveys already commenced and to be exhibited to the Board, be on a Scale of twenty Chains to an inch.

ORDERED—

That the Agents be authorized each of them, from time to time, to make reasonable advances to the Surveyors, Chain-bearers, and Labourers, and for the Incidental Expenses attending the Surveys.

Immediately after the orders were made for the survey of Passamaquoddy Bay, there was presented to the board a statement from

Mr. Webber in relation to the observations which were begun for the purpose of ascertaining the latitude and longitude of the mouth and source of one or both of the rivers Schoodiac and Magaguadavic, and which were, agreeably to the direction of the board, suspended on the 6th of October.

Statement of
Mr. Webber

After adverting to the fact that he had, at the request of Mr. Howell, embarked with him and Mr. Sullivan at Boston on the 12th of August, with such instruments from "the University at Cambridge" as were thought necessary, Mr. Webber said:

Immediately after their arrival at Saint-Andrews he proceeded to the mouth of the Magaguadawack, one of the Rivers in question, with the expectation of being joined by a proper person on the part of the British Government, in making suitable observations at the mouth of each of them, and under an impression that the season required an industrious improvement of time, a suitable Station as it was judged, was chosen at the mouth of that River, and a temporary building erected on principles so æconomical as to allow of nothing unessential to the main objects and yet so liberal as to promise the full attainment of them. These objects are—The firm and steady support of the instruments, and their security against injury from Wind, Rain, &c. The instruments were then, viz. the 14th of September Last, set up; and as often as the weather allowed, Corresponding altitudes of the Sun were observed, in order to examine the going of the Clock, and determine with precision the time of any observation that might be made. There has however been so much cloudiness during the period of his residence at that place, as to render it impracticable to make so many observations of this kind as he wished, a good degree of confidence however may in his opinion be placed in the accuracy of the time,—Meridian and other altitudes of the Sun, and Meridian altitudes of certain fix't stars were also observed, in number and variety sufficient probably to determine the Latitude to the requisite degree of exactness.

But the extreme unsuitableness of Weather that has prevailed, affected in a particular manner, that part of the enquiry which respected the Longitude; and it was not found practicable to make such observations as would by any means prove satisfactory in determining it.

The results of the meeting at St. Andrews were briefly summarized in a report made by Mr. Barclay to Lord Grenville.

"The 5th" [of October], says Mr. Barclay, "we made an attempt to proceed up the River Scoodiac claimed by the Agent of His Majesty as the true St. Croix, but the Wind failing we were compelled to return to St. Andrews; after which the board met, confirmed the surveys

Results at St.
Andrews; Ad-
jourment to
Boston

commenced under the mutual agreement of the Agents and taking the future operations of the Surveyors under our control established rules and orders for their direction and government; ascertained their pay per day and that of the chainmen and laborers under them &c. &c. On the 6th the Commissioners attended by the Agents went to view the mouth of the River Magaguadavic claimed by the American Agent as the St. Croix intended in the treaty of Peace and the Island which he said had been named by the Sieur de Monts in 1604, *Isle de St. Croix*. The 7th we had a view of the Isle de St. Croix in the River Scoodiac as shown us by His Majestys Agent with the small Island in its front and as much of the River as he said he conceived necessary to be seen to evince that the Islands and River corresponded with the description given by L'Escarbot and Champlain french Historians, who attended the Sieur de Monts in his Voyage to that part of North America in 1604, and on our return we examined under oath in the Evening a number of Indians produced on the part of the united States—On the 8th the board established rules and regulations for authenticating Records and other public documents to be given in Evidence, with several other necessary orders and resolutions, particularly one directing a survey to be made of the bay of Passamaquady, the Islands therein, the Brooks and Rivers that discharge themselves into it and all the Mountains, high lands or head lands which present themselves to view in proceeding up the bay to either of the rivers in question, representing their Shapes and appearances respectively as they make or appear in proceeding to and up each of the Rivers in question.

“Having examined the Surveyors as to the probable period when their surveys would be completed and finding they could not be effected until late the next Autumn and the Agents having stated by a joint memorial that it would be out of their power to deliver in the Arguments on which their claims were founded until they were possessed of these Surveys, the board adjourned to the second Tuesday in August next, then to meet at Boston in the State of Massachusetts for the purpose of examining witnesses and to adjourn from thence to such place as his Majesty's agent should think necessary for examining any other witnesses he might wish to produce. The weather from the 20th of September to the 8th of October was so unfavorable as to prevent the Gentlemen employed from ascertaining the longitude of the mouth of either of the Rivers and the Season being far advanced we gave up the pursuit until next Spring. The Surveyors will probably continue at Work to the 10th

of November, at all Events they will remain in the field until driven in by Snow and extreme cold."¹

Amory, in his *Life of Sullivan*, gives substantially the same account of the proceedings at St. Andrews as Mr. Barclay. He says that Howell and Sullivan explored by boat the rivers claimed as the St. Croix. They found the western stream large and navigable far up; the eastern small, and interrupted a few miles up by falls. Indian chiefs came down the bay and confirmed the information obtained in 1764 as to the Magaguadavic. Judge Benson arrived on September 25, and the whole party explored together for ten days the bays, rivers, and islands. In the River Schoodiac they visited an island which answered the descriptions of Lescarbot, Charlevoix, and other French writers of the Isle de St. Croix, where De Monts passed the winter of 1604. On this island they found the remains of an old fortification.²

Mr. Sullivan, in a statement as to the proceedings of the commissioners published in Boston in the spring of 1797, said it was decided that the arguments of the agents should be in writing, and that the argument of the agent of the United States should be forwarded to the British agent by the 1st of February, 1797. The arguments of the agents seem, however, to have been delayed by the incompleteness of the surveys. In concluding his statement Mr. Sullivan says: "Why shall not all the nations on earth determine their disputes in this mode, rather than choke the rivers with their carcasses, and stain the soil of continents with their slain? The whole business has been proceeded upon with great ease, candor, and good-humor."³

October 8, 1796, the board adjourned at St. Andrews to meet at Boston on the second Tuesday in August, 1797.

VI. Production of Evidence

The second Tuesday in August 1797 fell on the eighth of that month, but, owing to the indisposition of Mr. Benson, the three commissioners did not reassemble at Boston until Friday the 11th, when the board held its sixth formal meeting.⁴ The commissioners met in a building on Water Street, near Fort Hill. Their principal object in

Meeting at Boston: Delays in surveys and arguments

¹ Mr. Barclay to Lord Grenville, Oct. 24, 1796, Rives, *Correspondence of Thomas Barclay*, 65, 66.

² Amory, *Life of Sullivan*, I. 320 et seq.

³ *Id.* 325.

⁴ In a report to Lord Grenville, Sept. 8, 1797, Barclay said that Judge Benson's ill health, by preventing his traveling with expedition from New York to Boston,

meeting at Boston was to facilitate the examination of witnesses whose testimony the agent of the United States desired to obtain. It appears that while at Boston they attended a public dinner given to President Adams at Faneuil Hall.

At the opening of the sitting Mr. Sullivan presented to the commission a memorial in which he said that, after the adjournment at St. Andrews, he had "attended closely" to the compiling of a "Statement of the Case" of the United States in answer to the Claim then filed on behalf of his Britannic Majesty, but that he had found more labor than he had expected. As the British claim was founded in a grant or patent made by King James to Sir William Alexander in 1621 of a province called Nova Scotia, and it was accordingly contended that the Schoodiac River was the St. Croix meant in the treaty of peace and that a certain lake or pond near the Penobscot River was its source, the surveyors were ordered to obtain a competent knowledge of the rivers and other waters and of the shores and islands which might be involved in the trial. The surveyors, said Mr. Sullivan, had so proceeded, but they were overtaken by the rains and an early and severe autumn, so that their progress was much short of what was expected. Three companies of surveyors, said Mr. Sullivan, were then in the field, but two of those appointed for the United States had been sick. One of them was able to return to duty, and measures had been taken to supply the place of the other; but there remained no hope that the surveys could be completed before the close of the autumn of 1798.

Mr. Sullivan further said that, when he read the British Claim, he did not know whether it was intended to urge the patent to Sir William Alexander "upon the sacred right of private property, or as the evidence of a boundary of jurisdiction only;" but that, finding that the boundary in the patent was up the River St. Croix *to the most western source or spring*, and that the boundary described in the treaty of peace was up the middle of the River St. Croix to its source, without designating the western spring or source as a place from which a line was to be drawn to the highlands, or as a place which divided the rivers, he was obliged to adopt a mode of statement which might otherwise have been unnecessary. He therefore had undertaken to show (1) that, notwithstanding the patent to Sir William Alexander in 1621, there was no province founded in or held under that grant in 1783; and (2) that in 1691, King William and Queen Mary, being in

"occasioned a delay in the meeting of the Board of seven days." Rives, Correspondence of Thomas Barclay, 73. In reality, the board held two meetings, August 11th and 14th, within the seven days after Tuesday the 8th.

the possession of the country called Acadia or Nova-Scotia by a then recent conquest, did by their charter of that date incorporate it, together with other territories and waters, in "The Province of Massachusetts-Bay in New-England," the boundaries of which were not diminished before the treaty of peace of 1783; and he had proposed to prove that the river called by the native Indians the Magaguadavic was the river truly intended in the treaty of peace as the St. Croix; but this point could not be fully considered nor could the arguments be concluded until the surveys and maps were completed.

Mr. Sullivan said that his "Statement," filling about two hundred pages, was forwarded to the British agent in New Brunswick in February, the great number of records and documents to be examined having rendered it impracticable to send it sooner, but that its receipt by Mr. Chipman had been delayed by the difficulty of communication, more especially in the winter season. On the 22d of July he had received Mr. Chipman's "Reply," containing more than three hundred pages, in which many allegations were made on the strength of evidence yet to be adduced, while many arguments were drawn from facts supposed to be proved by the surveys then in process, and numerous citations were made of authorities and documents not then in the possession or within the reach of the agent of the United States. In order that the arguments might be concluded, not only must the surveys and maps be completed, and the authorities and documents be collected and examined, but there must be adduced a variety of evidence which would necessarily be interwoven with the several parts of the statements. On these grounds Mr. Sullivan proposed that each side should be allowed to proceed to introduce such evidence as it was ready to offer, the board, after the evidence was produced, to make such order as justice might require.

The first reference found in the records of the commission to the taking of testimony is the statement in the journal of the meeting at St. Andrews on October 7, 1796, that "the following Indians of the Passamaquoddy and Machias Tribes were produced, sworn and examined as Witnesses on the part of the United States, John Baptiste a White-man being sworn as Interpreter, viz. Captain Nicholas Awawas, Thomas Louis, Joshua John Thomas John Baptist, Francis Nicholas, Anthony, John Thomas & Gabriel." The apparent inattention to punctuation leaves an uncertainty as to the actual names and number of the witnesses.

Taking of
testimony

At the meeting on the next day, the 8th of October, Mr. Chipman presented a memorial in which, after stating that, before the arguments were heard and the decision rendered, it would be necessary to

obtain the testimony of divers witnesses residing in New Brunswick and Nova Scotia to whom it would, by reason of age, infirmity, inability to travel or public official business, be inconvenient to attend at a distant place, he requested the board at its convenience to adjourn to some place within one of those provinces for the purpose of examining such witnesses as he should find it necessary to produce on behalf of His Majesty.

On the same day Mr. Sullivan presented a memorial in which he dealt with the subject of evidence in a broader and somewhat different way. After reciting that the United States would find it necessary "to offer evidence arising from papers, documents and records in the office of The Secretary of the United States, and in the offices of some of the Secretaries of the particular States in the Union, and to procure the testimony of witnesses who are so aged and infirm as to be unable to attend personally, and of others whose public official business will render it inconvenient for them to give their personal attendance," he proposed that some rule might be established "as well for authenticating copies of records, papers and documents to be offered," as well as for "taking depositions," and that "provision may be made for Writs of Summon for Witnesses."

The board, so the journal reads,

THEREUPON ORDERED.

That Copies of Records or other public papers may be read in evidence to this Board, if authenticated in such form as would render them admissible in evidence in a Court of Justice in the Kingdom, Province or State where such Record, or other Public Paper shall be remaining.

ORDERED.

That the further consideration of the said Memorials be postponed until the next meeting of the Board on an adjournment of the present Meeting.

Mr. Sullivan, when he assumed the agency of the United States, shared the definite impression, which then widely prevailed in the United States, that the plenipotentiaries who signed the treaty of peace of 1783, having Mitchell's map before them, intended as the St. Croix the first river westward of the St. John; and that not only Adams and Jay, the surviving American plenipotentiaries, but also Hartley, the British plenipotentiary, and Lord St. Helens, who was present at the negotiations as Alleyne Fitzherbert, and Mr. Whitefoord, who was secretary to Oswald, the British commissioner at the negotiation of the pro-

Question as to
Mitchell's map

visional peace, would attest the fact. Mr. Sullivan appears to have expressed this expectation very confidently to Mr. Chipman, and great importance not unnaturally was attached to it.¹

Among the documents which Mr. Sullivan presented to the board was a copy of Mitchell's map found in the office of the Secretary of State of the United States, which was said to be the copy used by the American plenipotentiaries at Paris and on which the boundary was marked with a pen or pencil.²

On August 15, 1797, the commission met at Quincy for the purpose of taking the testimony of Adams. The purport of his testimony was merely that the commissioners who negotiated and signed the peace intended to adopt the limits of Massachusetts Bay and the St. Croix River mentioned in its charter, and that, while this river "was supposed to be delineated on Mitchell's map," there was no understanding that the map was to be decisive. The record of his testimony reads:

Testimony of
Adams

John Adams, President of the United States of America, appeared before the Board and (being sworn) was examined as a witness to the following Interrogatories, viz: Interrogatories by the Agent of the United States.

1st. What Plan or Plans, Map or Maps, were before the Commissioners, who formed the Treaty of Peace in 1783 between His Britannic Majesty and The United States of America?

Answer. Mitchell's map was the only map or plan, which was used by the Commissioners at their public Conferences, though other maps were occasionally consulted by the American Commissioners at their lodgings.

2d. Whether any lines were marked at that time as designating the boundaries of The United States upon any, or upon what map?

Answer. Lines were marked at that time as designating the boundaries of The United States upon Mitchell's map.

3rd. What Rivers were claimed to, or talked of, by the Commissioners on either side, as a proposed boundary, and for what reason?

Answer. The British Commissioners first claimed to Piscataqua River, then to Kennebec, then to Penobscot, and at length to St. Croix, as marked on Mitchell's map. One of the American Ministers at first proposed the River St. John's, as marked on Mitchell's map, but his Colleagues, observing, that, as St. Croix was the River mentioned in the charter of Massachusetts Bay, they could not justify insisting on St. John's as an ultimatum—he agreed with them to adhere to the charter of Massachusetts Bay.

4th. Whether a copy of a patent to Sir William Alexander, or any Act of Parliament of Great Britain were before the said

¹ Rives, Correspondence of Thomas Barclay, 66.

² Id. 76.

Commissioners at that time, or spoken of, or relied upon, by the Commissioners on the part of His Britannic Majesty?

Answer. It was very probable that the patent of King James to Sir William Alexander, and that an act or acts of Parliament might be produced and argued on, but I do not recollect, at this time, any particular use that was made of them. Nothing was ultimately relied on, which interfered with the Charter of Massachusetts Bay.

5th. Generally, what plans, documents, and papers were before the said Commissioners, when the said Article of the same Treaty was formed?

Answer. No other plan than Mitchell's map that I recollect. Documents from the public offices in England were brought over and laid before us; in answer to which we produced the memorials of Governor Shirley and Mr. ———, and the counter memorials of the French Commis^{rs} at Paris, in a printed quarto volume, a report of Mr. Hutchinson to the General Court printed in a Journal of the House of Representatives, not many years from 1760, though I cannot now recollect the precise year, and certain proceedings of Governors Pownall and Bernard, recorded also in the Journals of the House of Representatives, and the charter of Massachusetts.

6th. What were the lines claimed on each side and how was the matter ultimately settled?

Answer. Answered in part under the 3rd question. The ultimate agreement was to adhere to the Charter of Massachusetts Bay and St. Croix River mentioned in it, which was supposed to be delineated on Mitchell's map.

7th. Whether it was agreed to let the matter of boundary between the State of Massachusetts and the Province of Nova Scotia remain as the same had been conceived to be?

Answer. Answered under the 3rd and 6th questions.

Interrogatory by the Commissioners

In explanation of your answer to the 3rd Interrogatory proposed by the Agent on the part of the United States, do you know whether it was understood, intended or agreed, between the British and American Commissioners, that the River St. Croix as marked on Mitchell's map, should so be the boundary as to preclude all inquiry respecting any error or mistake in the said Map, in designating the River St. Croix? Or was there any, if so, what understanding, intent, or agreement, between the Commissioners relative to the case of error or mistake in the said Map?

Answer. The case of such supposed error or mistake was not suggested, consequently, there was no understanding, intent, or agreement expressed respecting it.

The next day, August 16, at Boston, the commission adopted the following resolution:

Resolved—By the consent of The Agents, That any Testimony of Jay further Depositions of John Adams President of The United-States; and any Deposition of John Jay, Governor of the

State of New-York, taken before a Judge of the Supreme Court of The United-States, or of a State,—or a Judge of the District-Court of The United-States, may be read in evidence equally as if taken before the Board.

No further testimony was given by Adams, but the following deposition was afterwards made by Jay:

The answer of John Jay, who was one of the American Commissioners, by whom the Treaty of Peace between Great Britain and the United States was negotiated, to the interrogatories put to him, at the instance of the Agent on the part of the United States, by the Board of Commissioners for ascertaining the River St. Croix, intended in and by the said Treaty.

The said John Jay, having been duly sworn, answers and says,—that, in the course of the said negotiations, difficulties arose respecting the eastern extent of The United States; that Mitchell's Map was before them, and was frequently consulted for geographical information; that in settling the eastern boundary line (described in the Treaty), and of which the River St. Croix forms a part, it became a question which of the rivers in those parts was the true River St. Croix, it being said that several of them had that name; that they did finally agree, that the River St. Croix laid down in Mitchell's Map, was the River St. Croix which ought to form a part of the said boundary line. But whether that river was then so decidedly and permanently adopted, and agreed upon by the parties as conclusively to bind the two nations to that limit, even in case it should afterwards appear that Mitchell had been mistaken, and that the true River St. Croix was a different one from that which is delineated by that name on his Map, was a question or case which he does not recollect nor believe was then put or talked of.

By whom in particular that Map was then produced, and what other Maps, Charts and Documents of State were then before the Commissioners at Paris, and whether the British Commissioners then produced or mentioned an Act of Parliament respecting the boundaries of Massachusetts, are circumstances which his recollection does not enable him to ascertain. It seems to him that certain lines were marked on the copy of Mitchell's map, which was before them at Paris, but whether the Map mentioned in the Interrogatory as now produced, is that copy, or whether the lines said to appear in it are the same lines, he cannot without inspecting and examining it, undertake to judge.

To the last interrogatory he answers, that for his own part he was of opinion, that the easterly boundaries of the United States ought, on principles of right and justice to be the same with the easterly boundaries of the late Colony or Province of Massachusetts.

Although much was said and reasoned on the subject, yet he does not at this distance of time remember any particular and explicit declarations of the Parties to each other which would authorize him to say that the part of the said line (described in the Treaty) which is

formed by the River St. Croix, was mutually and clearly conceived and admitted to be also a part of the eastern boundary line of Massachusetts.

He doubts there having then been very clear conceptions relative to the just and precise easterly extent of Massachusetts; for he has reason to believe, that respectable opinions in America at that time considered the River St. John as the proper eastern limit of The United States.

JOHN JAY

Sworn this 21st of May 1798 before me,

EGBERT BENSON ¹

The foregoing deposition of Jay was first read in evidence from a copy, which was the subject of the following entry:

John Jay Governor of New York, having been examined as a Witness on the part of the United-States during the Recess of the Board, and it having been omitted to bring to this place the original of his deposition taken before Mr. Commissioner Benson, as one of the Judges of the Supreme Court of the State of New-York; The Agent for His Majesty consents that a Copy of the said Deposition transmitted by Mr. Benson to the Agent of The United-States may be read in evidence equally as the original Deposition.²

The original deposition was subsequently filed.³

To complete the evidence of the American commissioners of 1783, we print the following letter from Franklin to Jefferson:

PHILADELPHIA, *April 8th, 1790.*

Letter of Franklin

SIR: I received your letter of the 31st past, relating to encroachments made on the Eastern Limits of the United States by settlers under the British Government, pretending that it is the Western and not the Eastern River of the bay of Passamaquoddy, which was designated by the name of St. Croix in the Treaty of Peace with that nation; and requesting of me to communicate any facts which my memory or papers may enable me to recollect, & which may indicate the true river the commissioners on both sides had in view, to establish the boundary between the two nations. Your letter found me under a severe fit of malady, which prevented my answering it sooner, or attending indeed to any kind of business. I can assure you that I am perfectly clear in the remembrance that the map we used in tracing the boundary was brought to the Treaty by the Commissioners from England, and that it was the same that was published by Mitchell above 20 years before. Having a copy of that map by me in loose sheets, I send you that sheet which contains the bay of Passamaquoddy, where you will see that part of the boundary traced. I remember too that in that

¹ See, in a similar sense, letter of Jay to Sullivan, July 28, 1797, Correspondence of John Jay, IV. 228.

² 10th meeting, Providence, Aug. 20, 1798, MS. Journal.

³ 27th meeting, Providence, Sept. 19, 1798, MS. Journal.

part of the boundary, we relied much on the opinion of Mr. Adams, who had been concerned in some former disputes concerning those territories. I think therefore that you may obtain still further lights from him. That the map we used was Mitchell's map, Congress were acquainted at the time by a letter to their Secretary for Foreign Affairs, which I suppose may be found upon their files.

I have the honor [etc.]

B. FRANKLIN

Hon. T. JEFFERSON,
Sec. of State.

The letter referred to by Franklin as that by which Congress was acquainted that the plenipotentiaries used Mitchell's map is a letter sent by Adams, Franklin, and Jay to Livingston, Secretary of Foreign Affairs, December 14, 1782, in which they say: "The map used in the course of our negotiations was Mitchell's." ¹

Mr. Sullivan, in a letter to Judge Parsons, referring to the depositions of Adams and Jay, said: "Mr. Adams and [Mr.] Jay testify that they were governed by Mitchell's map, but add (strangely) that the bounds of the charter of Massachusetts were intended, when in fact the charter of 1692 (*sic*) was bounded on the gulf and river St. Lawrence. All Nova Scotia was, by the charter of William and Mary, a part of Massachusetts, and separated from it after the Treaty of Ryswick, in 1700, or about that time. The letters and papers were mentioned and produced. There have great difficulties resulted from that expression in these testimonies." ²

There can be no doubt that the apprehensions that had been raised in the mind of the British commissioner and of the British agent as to the evidence that might be adduced regarding the use of Mitchell's Map as a controlling factor in the definition of the boundary were dispelled by the testimony of Adams and Jay. The result was correspondingly disappointing to the American agent.

In July 1797, a party of Passamaquoddy chiefs came to Boston to testify as to the traditional names of the rivers in dispute. When the commission met the Indians appeared and swore that there was a tradition that De Monts wintered in the Schoodiac, but erected a cross on the Magaguadavic, and that the latter alone had been called the St. Croix. This statement was substantially the same as that made by Indian chiefs to Mitchell in 1764.

Depositions of
Indians

While the commissioners were at Boston the agents, besides

¹ Wharton, *Dip. Cor. Am. Rev.*, VI. 133.

² Amory, *Life of Sullivan*, I. 328.

submitting arguments, filed, in addition to those heretofore mentioned, numerous documentary proofs. After examining certain affidavits presented by the American agent, the British agent agreed to their being filed *de bene esse*, conceiving that they contained little or nothing material to the issue. Among the documents presented by the British agent were extracts from Champlain and facsimiles of his maps. The American agent objected to receiving these extracts and facsimiles, and demanded the production of the originals.¹

The journal of the meeting at Boston, August 11, 1797, contains the following entry:

The following Papers were filed by the Agent for The United States viz.

- Nº. 1. The Deposition of John Mitchel, together with Minutes of a Survey by him made of The River Saint-Croix, in the year 1764.
- Nº. 2. The testimony of John Mitchel respecting the survey of The River St. Croix. October 9th 1784.—
- Nº. 3. John Mitchel's Evidence in perpetuam with a plan annexed, September 16th 1790.
- Nº. 4. Mitchel's Instructions from Governor Bernard, to explore The River St. Croix, 1764.
- Nº. 5. Deposition of Mr. Israel Jones relative to the Survey of The River St. Croix, 22^d February 1790.

In the journal of the meeting at Boston, August 14, 1797, there is the following entry:

The following Paper was filed by the Agent for The United States, viz.

The Deposition of Joseph Bradbury relative to the River St. Croix.

Taken the 4th August 1796.

The following papers were filed by the Agent of His Britannic-Majesty, viz.

- Nº. 1. Extracts from Champlain, with plans annexed.
- Nº. 2. Depositions of Alexander Hodges, James Brown & Jeremiah Frost, Taken 19th. July 1797.
- Nº. 3. Affidavit of Charles Morris junr. Deputy Surveyor-General. Taken 17. July 1797.
- Nº. 4. Deposition of John Curry, Taken July 19, 1797.
- Nº. 5. Deposition of Mr. Robert Pagan. Taken 20th July 1797, with Articles numbered 1. 2. 3.

The Depositions of Alexander Hodges, James Brown, Jeremiah Frost, John Curry, Robert Pagan, and Charles Morris, Jr. are

¹ Rives, Correspondence of Thomas Barclay, 76.

allowed to be filed by consent, with certain Articles referred to in said Pagan's Deposition, upon an agreement that the Agent for The United-States may take the Depositions of the same persons, He notifying either Robert Pagan, Esq^{re}., or Joseph Garnet Esq^{re}., of Saint-Andrews to be present to examine on behalf of His Britannic Majesty's Agent.

On August 16, 1797, the board resolved that "all depositions filed, or hereafter to be filed, shall be subject to every exception which may be taken to the competency or credibility of the respective witnesses."

On the same day the board made an order respecting persons employed in obtaining evidence, as follows:

Robert Pagan and Joseph Garnett Esquires are named by the Agent of His Britannic-Majesty, and Phineas Bruce and John Cooper Esquires, on the part of The United-States, by the Agent of The United-States, to be reciprocally notified by the said Agents to attend to the taking any further evidence in this case, and in digging upon and examining any islands in or near Passamaquoddy Bay, for the purpose of further proof in this cause. And the said persons so named are to be notified in order that they or one of them may attend reciprocally at the taking of any such evidence, and at every such digging and examination.

On August 16, 1797, the board, at its ninth meeting, ended its session at Boston, and adjourned to meet at Providence in the State of Rhode Island, on the first Monday in June 1798.

The reason for this adjournment was the fact that, Adjournment to
Providence owing to unfavorable weather, the surveyors and astronomers had been unable to complete their labors, and were still at work. It was agreed that as soon as the surveys were completed a general map of all the rivers and of Passamaquoddy Bay should be made.¹

In reality the meeting at Providence did not take place at the time originally set. The agents having advised the commissioners by letter that the survey of the Schoodiac could not be Meeting at
Providence completed before the end of July, the commissioners "communicated with each other, also by letter, on the subject, and agreed that the meeting of the Board be postponed from the first Monday in June to Wednesday the 15th of August instant."² A further postponement of five days afterwards took place, so that the board actually met at Providence on August 20, 1798.

¹ Rives, *Correspondence of Thomas Barclay*, 75, 76.

² MS. Journal, Aug. 20, 1798.

On the reassembling of the commissioners at Providence, the secretary informed the board that the agent of the United States had, during the recess, filed the following papers:

The Proceedings of the General Court of Massachusetts on the Petition of Savage & others anno 1731.

The Depositions of James Nichols, Alexander Nichols, Herman Brimmer, Benja. Shaw, John Frost, John Curry, Thomas Wright, William Ricker, John Fountain, Alexander Hodges, Abram Duncan, & Francis Joseph.

The journal then records the filing by the agent of the United States of additional papers, as follows:

Deposition of James Boyd with copy of Commission referred to therein.

Remarks in regard to the western Limits of New-Brunswick, and the property of the Islands in the Bay of Passamaquoddy, drawn up by C: Morris. S: General.—Nova-Scotia 1789.
Report of Brattle, &c.

At the same meeting the American agent presented a memorial respecting the correction of errors. This memorial reads:

The Undersigned Agent for The United-States begs leave most respectfully to represent that he has the evidence & arguments on the part of the said States, reduced to writing, and is ready to submit the same to the Honorable Board. But as the question now to be decided upon is of vast importance to the power which he has the honour to represent and as he wishes a decision may be had altogether upon a consideration of the merits of the Question, he proposes that if any error or defect of form should appear to have happened in the collecting or authenticating the evidence—That such circumstance shall not have any influence in the determination; but that the parties may have due notice of the same, and be indulged with him to correct such error, or to cure such defect.

He also suggests to The Honorable Board, that it may become expedient to have a fair copy of the whole proceedings attested, and delivered to each Government.

On September 1, 1798, so the journal reads, the following papers were filed by the agent for his Britannic Majesty:

- Nº. 1. Commission to Richard Phillips Esq. as Governor of Nova-Scotia 1719. To which is annexed "A List of Grants made by the Governors of Nova-Scotia."
- Nº. 2. Draught of a Commission for the Hon^ble Col: Cornwallis to be Governor of Nova-Scotia, 29th April 1749.
- Nº. 3. Representation to His Majesty with the Draught of a Commission for Charles Lawrence Esq: to be Governor of Nova-Scotia, December 18th 1755.

- N^o. 4. Draught of a Commission to Henry Ellis Esq: to be Governor of Nova-Scotia, 1st April 1761.
- N^o. 5. Draught of a Commission to Montague Wilmot Esq: to be Governor of Nova-Scotia, 5th October 1763.
- N^o. 6. Copy of the Revocation of Lord William Campbell's commission; & Commission to Francis Legge Esq: as Governor of Nova-Scotia. 1765.
- N^o. 7. Copy of a Minute of the Boston Council, July 17, 1733.¹
- N^o. 8. Order to M^r. Mitchell for surveying Mines &c. and the Bay of Fundy.—April 10th 1734.²
- N^o. 9. Governor Bernard's Remarks on the River Saint-Croix 1764.
- N^o. 10. Gov^r. Bernard's Letter Feb^{ry}. 9—1765.
- N^o. 11. Observations upon Gov^r. Bernard's Remarks on his plan of Passamaquaddy Bay made in 1764, by Charles Morris 1765.
- N^o. 12. Deposition of Thomas Wright taken on Interrogatories 24th October 1797.
- N^o. 13. Deposition of Thomas Wright respecting Ruins &c. 24th October 1797.

The following papers were filed by the agent of the United States:

- N^o. 1. Governor Stoughton's Letter to M^r. Pettit, Decembre 2^d 1795.
- N^o. 2. Lieu^t. Governor Stoughton's Letter to the Lords Commissioners of the Council for Trade, &c. Dec. 20th 1700.
- N^o. 3. His Majesty King William's Letter of the 19th of January 170^o, referring to the building of Forts in the Massachusetts-Bay and yielding assistance to New-York, in case of an invasion by an Enemy. Rec^d. May 17th 1701. via N.York.
- N^o. 4. Governor Dudley's Message, and proceedings 1702.
- N^o. 5. Address to Her Majesty Queen Anne, February 1704.
- N^o. 6. Resolve for extending the government over the eastern country June 26th 1716.
- N^o. 7. M^r. Mauduit's answer to the Lords of Trade.
- N^o. 8. Proclamation for Canada & Florida Governments.
- N^o. 9. Report of Generals Lincoln & Knox to the Governor of Massachusetts 19th Oct^r. 1784.

¹ This is a minute of a meeting of the Council, held at Boston, July 17, 1733, at which a proposal of David Dunbar, surveyor-general of New Hampshire, that a force be sent to hold for the time being Fort Frederick, at Pemaquid, lest it be destroyed by the Indians, was voted down. As to David Dunbar, see Osgood's *The American Colonies in the 18th Century*, and particularly, I, 289, 319; III, 328 et seq.

² This is an order, dated at Annapolis Royal, and addressed to "George Mitchell, Gentleman, one of the Deputy Surveyors of the Woods in North-America," directing him, pursuant to instructions dated at Boston, April 22, 1730, to make surveys at "Mines, Pissaguit, Cabaquit, Cape Doré, Schickanecto and Chipody," and then "round the Bay of Fundy to Passamaquoddy, Grand Menan," and on to Cape Sables, taking "particular notes of all the Harbours, Rivers, Creeks and Bays, and of such Islands as are near unto the Continent," and being "exact as to their Entrance and depth of Water"; and to make a plan of the whole, and a written report. MSS. Dept. of State.

N^o.10. General Knox's Deposition.

N^o.11. James Boyd's Deposition in regard to certain Ponds,
August 10th 1798.

At the twenty-fifth meeting of the commission, on September 17, 1798, the following papers were filed on the part of Great Britain:

Governor Bernard's proclamation. 1768.

Letter from Dr. Franklin to M^r. Jefferson 8th April 1790.

Letter from M^r. Adams (Vice-president) to James Sullivan Esq:
August 2^d. 1796.

The following were filed on the part of the United States:

Governor Hutchinson's Report, 1762.

Proceedings on the separation of the province 1702, 1703.

Letter from Gov^r. Hancock to Gov^r. Parr Nov^r. 12, 1784.

Letter from Gov^r. Parr to Gov^r. Hancock Dec^r. 7, 1784.

Letter from Gov^r. Carleton of New-Brunswick respecting Bound-
ary-Line, June 21. 1785.

Letter from Bishop Peters to Dr. Belknap—Sept^r. 1, 1795.

Finally, at the twenty-seventh meeting, September 19, 1798, the agent of the United States filed the following documents:

Agent Bollan's Letter to the General Court of Massachusetts,
1760.

Col. Allan's Letter to Governor Hancock 1783.

Result of the Doings of the Governor and Council of Massachu-
setts respecting encroachments on the eastern part of that
Commonwealth.

Governor Carleton's Letter to Governor Bowdoin 18th October
1785.

It has been seen that the treaty required the commissioners in their final declaration to particularize the latitude and longitude

Latitude and longitude of St. Croix's source	both of the source and the mouth of the river which should be decided to be the St. Croix. As early as September 23, 1796, while at St. Andrews, Mr. Sullivan, during the discussions with Mr. Chipman as to the sur- veys then about to be undertaken, remarked: "Though I conceive a survey to be absolutely necessary in order to give a proper degree of information to the Commissioners, yet if the Treaty had said nothing in regard to latitude and longitude I should have considered it as of no importance in the decision, because that could have been done at any other time, and by other persons better than by the Commis- sioners." ¹
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This seems to have been the first suggestion from any quarter that the determination of the latitude and longitude, as distinguished

¹ Mr. Sullivan to Mr. Chipman, Sept. 23, 1796, MSS. Dept. of State.

from the survey, of any part of any of the rivers might be dispensed with.

During the session of the commissioners at Boston the board on August 16, 1797, made an order directing that astronomers be employed to ascertain the latitude and longitude of the mouths but not of the sources of the rivers respectively claimed by Great Britain and the United States as the St. Croix. This order reads:

Resolved, That Samuel Webber, or such other person as shall be nominated by the Agent on the part of The United-States, and Thomas Wright, or such other person as shall be nominated by the Agent on the part of His Britannic-Majesty, be employed as Astronomers by this Board, to ascertain the latitude and longitude of the mouths of the two Rivers, the one claimed on behalf of His Britannic-Majesty known by the name of The Scoudiac, and the other claimed on the part of The United-States, known by the name of The Magaguadavick, as the River truly intended under the name of The River Saint-Croix mentioned in the Treaty of Peace between His said Majesty and the said United-States. And that they transmit one copy of their Report to each of the Agents, and three Copies to the Secretary of this Board.

When this resolution was adopted the work in the field was already much behind, and the commissioners advised the agents to recommend their governments to relieve the board of the duty of particularizing the latitude and longitude of the source of the river which should be held to be the St. Croix of the treaty. The commissioners conceived that if the latitude and longitude of the mouth were ascertained, "a minute description of the courses and distances from thence to its source would completely answer every purpose intended and identify the source beyond the possibility of future doubt."¹ In accordance with this view instructions were sent to Mr. King, the minister of the United States at London, who on the 15th of March 1798 concluded with Lord Grenville an "explanatory article" by which it was agreed that the commissioners, instead of particularizing the latitude and longitude of the source, might describe the river in such other manner as they might judge expedient; and it was also agreed that, as soon as might be after the decision of the commissioners was rendered, the two governments should concert measures to erect and keep in repair a suitable monument at the place ascertained and described to be the source of the River St. Croix.²

Although the specifications of the latitude and longitude of the

¹ Mr. Barclay to Mr. Liston, British minister, May 2, 1798, Rives, Correspondence of Thomas Barclay, 81.

² Am. State Papers, For. Rel. II. 183-5; Treaties and Conventions of the United States, 1776-1887, 396.

source of the river which should be held to form the boundary was thus dispensed with, a full and detailed report was made to the board on the latitude and longitude of the mouths of the rivers Schoodiac and Magaguadavic, respectively claimed by Great Britain and the United States as the St. Croix intended by the treaty of peace. The circumstance that this report was completed and dated at Cambridge, Massachusetts, September 3, 1798, probably accounts for the fact that it was signed only by Mr. Webber, who, as has been seen, was professor of astronomy at Harvard College; but it incorporated the results not only of his observations but also of those of Mr. Wright, the astronomer on the part of Great Britain. Only an abstract is here given, many of the details and figures having ceased to be of interest.¹

The report bears the following title:

Report of the astronomical observations made, in order to determine the Latitude and Longitude of the mouths of the Rivers Scoudiac and Magaquadavick—the two rivers in question, as the true Saint-Croix, by Mr. Thomas Wright, Astronomer on the part of his Britannic Majesty, and Mr. Samuel Webber, astronomer on the part of the United States of America, under the authority of the Commissioners appointed pursuant to the fifth article of the Treaty of Amity, Commerce, and Navigation, concluded between his said Majesty, and the said United States on the nineteenth day of November, One thousand seven hundred and ninety four, to decide what river is the river Saint Croix truly intended in the Treaty of Peace between his said Majesty and the said United States, to be part of the boundary line therein described.

It appears by the report that an observatory was erected “on the point which makes the Easterly part of Saint Andrews town between the mouths of the two rivers in question.” The instruments consisted of two clocks, a portable astronomical quadrant of two feet radius, and a sextant of 14.3 inches radius equipped with a telescope and a vernier reading to minutes. The artificial horizon for use with the sextant consisted of a vessel of olive oil covered with a glass roof, the glass for which had been made to have parallel surfaces. The observers also had two telescopes, “an Achromatic Telescope of 46 inches focal distance” and “a two feet reflecting Telescope having an aperture of 4.2 inches, and supposed to magnify 75 times.” A theodolite is also mentioned. The report goes on to say:

¹ I desire to make my acknowledgments to the United States Coast and Geodetic Survey for its advice and aid in the making of the abstract.

The observations for determining the latitude and longitude of this temporary observatory were made in 1797 between the 20th of September and the 15th of November, both inclusive. When observations were made that required the time, it was always counted on the clock by the Assistant Mr. George Waterhouse, who was very careful and attentive.

The rate of one clock was determined by Mr. Wright by observing double altitudes of the sun with the sextant and the artificial horizon. The rate of the other clock, which was apparently quite accurate, was determined by Mr. Webber by observing altitudes of the sun with the quadrant on every day the weather permitted observations between September 27 and the end of the period. In addition the two clocks were frequently compared with each other at different hours of the day to determine their relative rates. The report further says:

For the Latitude meridian double altitudes of the sun were taken by Mr. Wright with the aforesaid sextant & artificial horizon, & meridian altitudes of the sun & certain fixed stars by Mr. Webber with the Astronomical Quadrant.

The mean refraction of the atmosphere was corrected according to its real state, as shown by a barometer and a thermometer. The latitude according to one observer nearly agrees with that resulting from the observations of the other."

In the report the results only of Mr. Webber's observations are given for the latitude work. He observed the meridian altitude of the sun on seven different days, and that of each of seven different stars on two different days. The mean of his results gave a latitude for the observatory of $45^{\circ} 04' 43''$, the individual values ranging from $45^{\circ} 04' 27.''1$ to $45^{\circ} 04' 53.''5$.

The longitude of the observatory was determined by observing eclipses of Jupiter's first satellite. Observations were made by both observers on four different nights and by Mr. Webber on a fifth night. On two of the nights the immersion of the satellite was observed and, on the other three, the emersion. The mean value for the longitude as thus determined by Mr. Wright was 4 h. 28 m. 38.7 s. and by Mr. Webber 4 h. 28 m. 40.2 s. The "longitude of the observatory therefore," says the report, "according to the observations on the eclipses of Jupiters first satellite, & the calculations in the nautical almanack is $4.28.39$, or $67^{\circ} 9' 45''$ west from the Royal observatory at Greenwich."

The longitude was also determined on October 13 by observing with sextants three lunar distances between the moon and the sun. These observations were not used, however, because "the accuracy of the Longitude deduced from the observation of eclipses of Jupi-

ter's first satellite would not probably be increased by taking the mean of that result, and the result of the lunar distances."

In connection with the other work at the observatory, azimuth observations were made on the sun in order to determine the variation of the magnetic needle. The deviation of the needle was found to be 12° 19' West. The report reads:

The Latitude & Longitude of the observatory being thus determined, the Latitude & Longitude of the mouth of each river was deduced therefrom. For this purpose Mr. Wright examined the map drawn by himself, by a scale of 4000 feet to one inch from his own survey of the Coast in 1772, ascertained the distance & bearing on the same; and thence deduced the difference of Latitude and Longitude. Mr. Webber took such measures of lines with a surveying chain, & of angles with a Theodolite, as to enable him to determine the sides and angles of a series of Triangles, extending from the observatory to the mouth of each river. The unsuitableness of weather when this part of the operation was performed, & the want of more time, rendered it necessary to deviate in some particulars from that mode of proceeding, which was supposed capable of ensuring the greatest degree of certainty. Hence the position of one side of one of the Triangles, with respect to the true meridian, was ascertained by taking the mean of its bearing by the needle, at several different times, and applying the variation, when it was much wished to adopt some superior method. The deductions however are presumed to be near the Truth. The triangles were referred to the meridian of the observatory & a perpendicular intersecting it, at the observatory. The difference of Latitude was inferred by allowing at the rate of 60778 fathoms for a degree according to Cassini's measure of a degree of the Meridian at the parallel of 45 degrees. And the difference of Longitude, by allowing at the rate of 43212 fathoms to a degree according to a Table given in the Philosophical transactions for middle Latitudes, by Gen. Roy.

Result of the operations for determining the difference in Latitude & Longitude between the Observatory, & the mouth of each river, or the middle of a line supposed to be drawn across the river at its junction with the bay:

	<i>By Mr. Wright.</i>	<i>By Mr. Webber.</i>
	<i>Magaquadawee</i>	
Latitude from Observy.	2.55.6	2.50.3 N
Longitude in time	0.34.—	0.35.7 E
	<i>Scoodiac</i>	
Latitude from Observy.	0.15.—	0.29.2 N
Longitude in time	0.10.4	11.5 W
<i>Difference of the Mouths in—</i>		
Latitude	2.40.6	2.21.1 Mag. N
Long. in time	0.44.4	0.47.2 Mag. E

Hence the mean difference of the mouths in

Latitude	2.30.8.
Long. in time	0.45.8

It is stated in the report that in 1796, between September 20th and October 3d, Mr. Webber had made latitude observations at the mouth of the Magaguadavic. These consisted of 5 meridian altitude observations on the sun and 12 similar observations on 6 different stars. The mean of the various determinations gave $45^{\circ} 07' 43''$ as the latitude of the mouth of the Magaguadavic. This determination was used as follows:

Latitude by mean of the means	45.7.43.-
Latitude of the Observatory at St. Andrews	45.4.43.-
Difference	0.3.-
Difference by mean of survey & Mensuration	0.2.52.9
Mean of these differences to the nearest second	0.2.56.-

The report concludes as follows:

Hence if this mean difference be considered as the true difference, & the results of the observations at the observatory as its Latitude, it appears from the observations that the

	° ' "
Latitude of the Magaquada-week is	45. 7.39.N
Longitude from Greenwich	67. 1. 0.W
" " Cambridge	4. 5.45.E
Latitude of the Scoudiac	45. 5. 5.N
Longitude from Greenwich	57.12.30.W
" " Cambridge	3.54.15.E

It is necessary to remark that notwithstanding considerable attention has been given to the matter, it has happened from the concurrence of various causes, that the allowance for the error, of the line of collimation in the Astronomical Quadrant, has not been satisfactorily settled. When entire satisfaction is obtained on this point, for which no exertion will be spared, should the error differ from what is here assumed, a correction in the Latitudes deduced from observations with the Quadrant will be necessary. The absolute, but not the relative Latitudes may be affected thereby. And when observations of those eclipses of Jupiter's first satellite from which the Longitude is deduced, or of others which happened near the time are obtained from the Royal observatory at Greenwich, or from some other established Observatory: if it should appear from the observations, that the apparent times of those eclipses at Greenwich are different from those which are published in the Nautical Almanack, a correction of the Longitudes should be made accordingly. They will, however, relatively to each other remain unaffected by any such correction. The Longitudes are

compared with that of the University at Cambridge, which may be considered as accurately settled to within about one or two seconds of time, and is fixed at 4 h. 44' and about 27" in time west from Greenwich.

Notwithstanding the relief afforded by the "explanatory article" the surveys were not completed until the autumn of 1798. Moreover, on August 16, 1797, the commissioners, when at Boston, made an order for the preparation of a general map by George Sproule, surveyor-general of New Brunswick. This order reads:

Surveys:

General map

Resolved.—That the Surveyors employed under the authority of this Board shall as soon as conveniently may be after they shall severally have compleated the respective Surveys transmit certified copies of their Field-Books, Maps, and other Papers to George Sproule of Fredericton Esquire, who is hereby employed by this Board to compile and form from the said Field-Books, Maps, and Papers,—and also from the Map of The Bay of Passamaquody and the Islands therein (which has been admitted in evidence by the Agents), A Map—on such Scale as he shall deem most eligible, and transmit one copy to each of the Agents, and three other copies thereof to the Secretary of this Board.

And when he shall have compleated the said Map, That he then return to the Secretary of this Board the Maps, Field-Books and papers which he may have received from the Surveyors.

In the distribution of the five copies thus ordered, it was the intention of the board that each agent should have a copy for his own use in the preparation of his arguments, and that the board should have at its own disposal enough copies to enable it to attach to the text of its final decision, which should be handed to each agent, a copy on which should be marked the river found to be the St. Croix, and also the designation of its source, the map thus marked to become a part of the decision.¹ As a result, however, of the delay in the survey, there had been furnished for the use of the two agents, before the meeting at Providence, only one copy, and on this the representation of the survey of the western lakes of the south branch of the Schoodiac was lacking. This condition was unchanged when on September 22, 1798, the agents having closed their arguments, the board adjourned to meet again at Providence on the 15th

¹ Writing to Mr. Pickering, Secretary of State, Sept. 23, 1798, Mr. Sullivan said: "The Maps which I shall receive from the Commissioners are on a large scale—Perhaps they are 12 feet long and 8 broad. It will not do to trust that one by water, which will have the Commissioners marks upon it. The maps will be brought rolled up in a Box from New Brunswick, the paper is very thick and cannot be doubled without doing it an injury. The expense has been already very great and I could wish for orders on the subject." MSS. Dept. of State.

of October, in the expectation that the completed maps would then have been received.¹

VII. The Arguments

Mr. Sullivan, in a memorial to the board at Boston, August 11, 1797, said that the "Statement" of the United States, compiled in about two hundred pages, was forwarded to Mr. Chipman in February 1797, and that on the 22d of the following July he received from the latter a "Reply" of more than three hundred pages.²

At the ninth meeting of the board, held at Boston on August 16, 1797, Mr. Sullivan formally filed his "Argument in support of the Claim preferred by Him on the same 4th of October last," together with "the several Maps, and Documents referred to in the said Argument, for the inspection of the Agent of His said [Britannic] Majesty."³ This was the "Statement" mentioned in his memorial of August 11, 1797, as having been sent to Mr. Chipman in the preceding February.

On August 16, 1797, Mr. Chipman also formally filed what is described in the journal as his "Argument in support of the Claim preferred by Him on the 4th of October last," and also his "Reply to the Argument delivered to Him by the Agent of the United States." These together constituted the document of more than three hundred pages sent to Mr. Sullivan on the 20th of the preceding July.

The board thereupon made the following order:

That the Secretary repair to Boston by the first Monday in May next, and remain there until the day to which the Board shall adjourn, with the Memorials, Depositions and other matters which have been filed with Him—, To the end that the Agent on the part of The United-States may more conveniently inspect and examine the same.

During the recess, between the adjournment at Boston and the meeting at Providence, Mr. Sullivan filed with the secretary of the board a "Rejoinder"; Mr. Chipman, in answer, filed a "Supplemental Argument," with an appendix and atlas; and Mr. Sullivan filed "Remarks" upon Mr. Chipman's Supplemental Argument.

At Providence Mr. Chipman filed with the board a "Postscript" to his Supplemental Argument; Mr. Sullivan replied with some "Observations"; Mr. Chipman then filed a "Reply" to the Observations, and Mr. Sullivan closed with "Remarks" on the Reply. Thus, nine separate discussions were submitted in writing.

¹ Mr. Sullivan to Mr. Pickering, Sept. 23, 1798, MSS. Dept. of State; Rives, *Correspondence of Thomas Barclay*, 94.

² MS. Journal.

³ MS. Journal.

For more than a month after the board met at Providence, the commissioners were occupied in reading and hearing arguments.

The oral arguments were not less full and comprehensive than the written. On seventeen days the journal consists of the simple entry, "The Commissioners proceeded further to hear the Agents."¹

Mr. Howell, in his last official communication to his government on the work of the commission, declared: "The voluminous papers in this Case will remain a monument of the laborious researches, zeal, ability and fidelity of the Agents. I believe that no other man in the United States would have bestowed upon this controversy so much time and attention as Judge Sullivan has done. His strong attachments to that Quarter of the Country and his great historical reading pointed him out for this business, as well as his present Office in Massachusetts, and the celebrity of his professional Character."²

No one familiar with the labors of the agents can doubt that this encomium was well merited. Their immense industry, their tireless exploration of all available authorities, and their firm grasp and keen analysis of all the evidence that could be gathered, are attested by their arguments. These arguments, in which the historical and legal foundations for further settlements were laid, are now published for the first time.

¹ The meetings at which this entry was made were the tenth to the twenty-second, consecutively, held August 20 to 25, and August 27 to September 3, inclusive; and the twenty-fifth to the twenty-eighth, consecutively, held on September 17, 18, 19, 22.

² Mr. Howell to Mr. Pickering, Sec. of State, Jan. 3, 1799, MSS. Dept. of State.

1

MR. SULLIVAN'S STATEMENT
OF
THE CASE
OF
THE UNITED STATES

1. MR. SULLIVAN'S STATEMENT OF THE CASE OF THE UNITED STATES¹

ARRANGEMENT

1. Preliminary Observations.
2. Introduction.
3. Part first—The Agent for His Britannic Majesty having predicated the Claim of His Sovereign, on a Grant made by King James, anno 1621, to Sir William Alexander, the Agent for the United States shews that His Britannic Majesty in the year 1782. had no province holden under or founded in that Grant.
4. Part the second—That the whole territory, from the River Sagadahock to the Gulph and River Saint Lawrence, extending from the sea on the south, to Canada on the north, was by the Charter of William and Mary in 1691, granted to the Province of the Massachusetts Bay: And that no restriction of boundary, by compact or order of Government, was made as to that extent of country anterior to the Treaty of Paris in 1782.
5. Part third—That the River Magaquadavie is the River Saint Croix truly meant and intended in the Treaty of Peace as the River therein mentioned by that name; and forming a part of the boundary therein described.

PRELIMINARY OBSERVATIONS

The controversy between His Britannic Majesty and the United States of America, and which is by the Treaty of Amity, Commerce and Navigation between those powers submitted to the honourable

¹ This is taken from vol. 3 of the records of the commission, where it is entitled: "The Claim / of the / United-States of America / to the / Magaquadavie, / As the Saint-Croix Boundary / stated by / their Agent James Sullivan. / 1797."

On the verso of the cover there is this entry: "N. B. this volume is not double paged, because the references in the subsequent arguments are made to the sections, and not to the pages."

Opposite the above, on the fly-leaf, is the following: "The Agent of the United States has not had time, since the copies of the arguments were made out by the secretary of the Board of Commissioners, to examine them. They may therefore be incorrect in some instances; more especially in the quotations from the french and other foreign languages."

In verifying quoted matter, frequent use has been made of *Mémoires des Commissaires du Roi et de ceux de Sa Majesté Britannique, sur les possessions et les droits respectifs des deux Couronnes en Amérique* . . . (Paris, 1755) leaving the underscoring as in manuscript volume 3. The contents of the *Mémoires* may be found, together with additional documents, in "The Memorials of the *English* and *French* Commissaries concerning the Limits of Nova Scotia or Acadia," published in London in 1755. All citations, whether of the one or of the other, by Mr. Sullivan or by Mr. Chipman, have been verified; but the verification has been made more onerous by the fact that the copyists of 1798 generally wrote "Memoirs", even where the volume and page prove that the citation was from the *Mémoires*.

The "Memorial," or Claim to the Magaquadavie, although it precedes the "Statement" in vol. 3, is not given here, as it has already been printed, supra 32-3.
EDITOR.

Board of Commissioners, is of great and interesting moment to the two nations which expect the decision.

Though the Question stated by the fifth Article of the Treaty above mentioned, appears there as merely a simple proposition, yet it involves in its decision a great variety of investigation, and opens a wide field for evidence and argument.

This field is by the Claim filed on behalf of His Britannic Majesty extended vastly beyond the circumference which was in the contemplation of the Agent for the United States before he was notified of the contents of that claim.

The harmony, peace and honour of the two Nations require, that this decision should be had upon facts and principles which will be preserved for the approving publick eye of the present age and for that of succeeding posterity.

This idea renders it fit and proper that the whole controversy should be upon paper.

The Claim of His Britannic Majesty having been predicated upon a Grant of His Royal Ancestor to Sir William Alexander; the Agent for the United States has considered it as necessary for him to examine the foundation of that statement in a minute but candid manner.

To do this, he was obliged to trace the History of the country in controversy, so far as the same can throw light upon the Question.

To compress that history and to state the important transactions which it contains in such a manner as that they should be clearly understood, and not be rendered tedious in the trial, was a task which exceeded in labour what the Agent of The United States previously expected. He now hopes that his statement will not be considered by the Board under all circumstances as being prolix, or unnecessarily minute.

The great object of this investigation is Truth. As nations feel themselves obliged in their Conduct by a dignity inseparable from publick happiness, so it becomes the duty of their Agents fairly and candidly to expose all the facts connected with the cause, which are in their possession.

Should there be any errors, mistake or want of perspicuity in the arguments as stated these will be corrected in an explication, with that candour and liberality which the dignity of the Controversy demands.

If any of the facts asserted have not evidence in their support the Agent for the United States will cease to urge his arguments upon them. If there shall be found any other facts important to the cause, he is assured that he shall be allowed to offer them. And wherever a

new arrangement of facts shall appear necessary or proper to the justice of the controversy he expects to have the privilege to effect it.

Under these Ideas the following Statement is submitted

By

JAMES SULLIVAN

Agent for the United States

FIRST PART. INTRODUCTION

To the Commissioners appointed pursuant to the fifth article of the Treaty of Amity, Commerce and Navigation concluded between His Britannic Majesty and the United States of America, on the nineteenth day of November in the year of our Lord one thousand seven hundred and ninety-four to decide—What River is the River Saint Croix truly intended under the name of the River Saint Croix in the Treaty of Peace between His said Majesty and the said United States, and forming a part of the boundary therein described, now in session at Boston on the fourteenth day of August, 1797.

The Agent for the said United States has the honour to suggest—That on the sixth¹ day of October 1796, he in his said capacity, filed before your Honourable Board then formed and in session at Saint Andrews his Memorial of Claim for the United States for the purpose of ascertaining the line of boundary between the territory under the dominion of His said Majesty, and the territory within the dominions of the same United States and therein had the honour to suggest—

That a certain River called by the native Indians, The Magaquadavie, and which river empties its waters into the Bay of Passamaquody, on the northeasterly side thereof is the River Saint Croix mentioned in and truly intended under the name of the River St Croix in the Treaty of Peace finally concluded between the said United States and His said Majesty in the year one thousand seven hundred and Eighty three. And that the same River forms a part of the boundary in the same Treaty described.

Recital of the
Claim of the
United States

Wherefore the said Agent prayed your Honorable Board that you would form and deliver a declaration according to the provision of the same Treaty of Amity, Commerce and Navigation describing the same River, particularizing the latitude and longitude of the mouth and the source of the same, and declaring that River to be the River St Croix mentioned in and truly intended in the said Treaty of 1783. as forming part of the Boundary therein described.

Upon which, The Agent for His Britannic Majesty filed before your Honourable Board his Memorial of Claim on the behalf of His said Majesty, and therein stated—

¹ This evidently is a copyist's error, the date being the fourth. See, *supra*, 33, 79, and elsewhere.—EDITOR.

That a certain River called by the native Indians The River *Scoudiac*, is the River truly intended by the name of the River S^t Croix in the same Treaty of Peace made and concluded as aforesaid and forming a part of the boundary therein mentioned and described.

Proposition of the
United States to
reply

And Whereas the said Agent for the United States by His Memorial aforesaid, now before your Honourable Board, had the honour further to suggest—

That if the Agent on the part of His said Majesty should file a Memorial in which he should suggest that any other River, Stream or water than the said River called by the Native Indians the Magaquadavie, is the River S^t Croix named in and truly intended by the same Treaty of Peace under the name of The River S^t Croix and forming a part of the boundary therein described; The Agent for the United States would be ready upon a day given for that purpose and after the necessary surveys should be made to lay before your Honourable Board such evidence as should be proper and necessary on the important Question by the two nations submitted to your decision.

The Agent for the United States has now the honor to submit such facts, circumstances, and Arguments as he conceives will fully and amply shew that no other than the River called by the native Indians The River Magaquadavie, & before-mentioned in the Claim of the United States, is the River S^t Croix truly intended under the name of The River St Croix in the same Treaty of peace and forming a part of the Boundary therein described.

As the Agent for His said Majesty has founded the Claim of His Government to the River Scoudiac, upon an idea that the same is a certain River which in the year one thousand six hundred and twenty one, was made the western boundary of a certain province called Nova Scotia, and granted by King James in that year to Sir William Alexander, and that the same is therefore The River truly intended by the name of The River Saint Croix in the said Treaty of peace: And that a line to be drawn due north from the source of The river S^t Croix according to the same Treaty as forming a part of the boundary of The United States is thereby meant and intended to be a line drawn due north from the westernmost Lake which empties its waters into the Scoudiac river, which Lake is near Penobscot-river and which is as he avers the most western Spring, or Fountain mentioned in the said Grant to the said Sir William Alexander, and intended as the source of the River S^t Croix mentioned in the said Treaty of Peace;

The Agent for the United States in answer to the Claim of His Britannic Majesty, as arising from, and deriving limits and bound-

aries in the same Treaty of peace from a Grant of a Province by His Royal Predecessor to the said Alexander, will have the honor to maintain:

First. That there was not when the Treaty of Peace was concluded upon in 1783, any province within His said Majesty's Dominions called Nova Scotia founded in a grant to Sir William Alexander in the year 1621. or at any other date

That there was no such province as Nova Scotia under Grant to Alexander existing in 1783

Secondly. That by the Charter of William & Mary of 1691, to the province of the Massachusetts Bay in New England, the whole of the Country and Territory between the river Sagadahock or Kennebeck on the west, and the River and Gulph of St Lawrence on the east and north, and on the Atlantick sea or ocean on the south, including what is now the Provinces of Nova Scotia and New Brunswick, was granted to the said Province of Massachusetts Bay: And that no line of division or compact or express order of restriction had in the year 1783 ever been agreed upon or made, by which the same lands were taken from the said Province.

Lands contained in the Charter to Massachusetts & no line of restriction before 1783

When the Agent for The United States shall have performed this part of his duty he will then proceed to shew by indubitable evidence, That in the Treaty of Peace concluded in 1783, the River therein truly meant and intended under the name of The River Saint Croix, was the River now Called by the Native Indians The River Magaquadavie.

That the River called Magaquadavie is the Boundary

And he will then consider What ought to be deemed and taken as the source of the River St Croix according to the meaning and intendment of the Treaty in 1783.

PART FIRST

Sec. 1. That there was not when the Treaty of Peace was concluded in 1783, any Province within His Majesty's Dominions called Nova Scotia founded on a grant to Sir William Alexander in the year 1621, or at any other date.

Sec. 2. To understand this point fully and to comprehend its application and use in the cause, it is necessary to take a glance at the discovery and settlement of the northern part of the American continent; and to consider the various acts of Possession—the conquests and multiplied grants & Charters of the European Princes & Governments which had the Territory now in controversy either wholly or in part, for their object.

Grants & Possessions of European Princes

Sec. 3. The discoveries made of various parts of the country by voyagers from various nations, are well known; and this honorable Board is intimately acquainted with the dates of them as well as with the principles on which the sovereigns of Europe claimed the Dominion of vast countries to which they had no right excepting what was derived from a superior force, unless from the multitude of their people an emigration to a Wilderness, for the cultivation of the soil there, had become necessary to the support of human life.

Sec. 4. Each Country was proud to mark its discoveries with its own name, and hence we find France giving the name of New Virginia granted France to that part of America which it claimed by right of prior discovery and which lies at the north of New England at a very early date. The first Colony granted by the English was called Virginia in honor of Queen Elizabeth; and the Northern part of the Continent from the thirtieth to the forty-fifth degree of northern latitude was called by the name of New England very soon after its discovery.^a

Sec. 5. The southern part of what is now the United States in the year 1606, was granted by King James to Sir Thomas Gates, Sir George Somers, Richard Hackluit and others—Sir Thomas Gates and his associates settled that part of the Country.

Sec. 6. King James by the same Charter granted to Sir Thomas Hanam, Raleigh Gilbert, John Popham and others who resided at Plymouth in England the territory between thirty-eight and forty-five degrees of Northern Latitude. This is so stated as to limits in Hazard's Collection first vol: page 50, but others mention the second Colony as extending no further south than to the fortieth degree of Latitude. This northern Colony was then called New England.^b

Sec. 7. It appears by the writings of all the Historians of the country that Gilbert began a settlement at Sagadahock under that Charter in 1608.

Sec. 8. Hutchinson says, that King James the first granted two Colonies, and that the northern Colony or New England, was granted to Merchants in Plymouth.^c

Sec. 9. Wynne, who published his History of America, not long

^a Hutchinson's His. 1. Vol. 2 page. [This reference means Hutchinson's History of Massachusetts-Bay, vol. 1, page 2.]

^b Hutchinson, Vol. 1, page 2.

^c Hutchinson, Vol. 1, page 2.

before the American Revolution in his first vol: page 31, says "In 1602, however, the captains Gilbert and Gesnold [*sic*] sailed from Plymouth, to that part of Virginia called New England and built a fort on a little island." Possession taken of New-England, 1602

Sec. 10. In the year 1620, The Duke of Lenox and others were made a Corporation of the Northern Colony for establishing, ordering and governing New England in America. By that Charter the Colony was extended to the 48th degree of north Latitude.^a Grant by King James New-England 1620. as far as the 48th degree of Latitude

The Charter is at large in Hazard's Collection first vol: 99.

Sec. 11. The Agent for the United States considers it as a settled fact in this case, That the Crown of Great Britain made its claim to what is now Canada, New Brunswick, and Nova Scotia on the same Principle that it made a claim to the New England Colonies. Nova-Scotia possessed in 1603

The discovery of Newfoundland was made by Gilbert in the time of Queen Elizabeth; and Gilbert & Gosnold were in Nova Scotia in 1603.

Sec. 12. That it would follow of course, that a particular name should be given to the Country of which possession was taken and that it should have an appellation in some measure resembling the Country or some part of the Country of the first discoverers, we are led to believe from the uniform practice of that day. The Country as high as the forty-fifth degree of north Latitude was called New England, at a very early day. This was done years before the Grant to Sir William Alexander. Origin of the name of Nova-Scotia

There can be no doubt but that from the analogy of ideas the northern situation of the territory—its position in regard to New England, and other circumstances which will be conceived without being minutely repeated, it was then and on that account called New-Scotland as far as the claim of King James extended.

Sec. 13. These Charters were all given in trust, The Patentees had the controul and Fee Simple of the Territory; but they had them for the purpose of establishing settlements in them under the Crown of England & Scotland. Charters in Trust

Sec. 14. In the Charter to Alexander there was as there always has been in other Charters for Colonies, a corporate name given to the Country—"Which same Lands in all future times shall be known by the name of Nova Scotia in America."^b But it does by no means follow that this was the origin of the name in that part of the Country.

^a Massachusetts Charter in 1691.

^b Quæ quidem terræ prædictæ omni tempore futuro, nomine novæ Scotiæ in Americâ &c. . . . [Memoirs, Com^{tes} at Paris 1755 v. 2, pp. 197 & 198.]

Sec. 15. We hear of no other name being given by the English to that part of the Country above forty-five degrees of North Latitude prior to the incorporation of the New England Company; At which time and by which Act, the whole to the forty-eighth degree of Latitude was called New England.

Sec. 16. Wynne, in his History page 46, considers Nova Scotia as bounded on New England, and on the 43^d degree of Latitude; and there is great reason to believe that the name of Nova Scotia which was extended over the whole country from the forty-fifth to the 48th degree of north Latitude was lost in the year 1620, by the Grant of the whole to the New England Corporation. And that King James, from his national pride, as King of Scotland and to gratify his Friends in the northern part of the British Island attempted to revive it in the grant of a part of the territory to Sir William Alexander in 1621.

Sec. 17. That the Claim of the Crown of England, under some name or other extended in those times to the north of Canada River is fully evinced by the expedition of Sir Lewis and David Kirk in 1627, under the mission of the English King. These men who were North Britons made a Conquest not only of Canada but of the territory called Nova Scotia & Acadie and expelled the French from the whole.^a

Sec. 18. In all this time the French gave the Name of New France to the whole Country, and continued their claim, and as far as they could their possession upon it. We do not find that Alexander had any actual government or authority in exercise over his Province, at any time whatever. Oldmixon an English historian tells us page 22 that, "The plantation never came to anything," that "neither the English nor the Scotch ever perfected a settlement." He published his history in 1708. In fact the Province when it was afterwards ceded to the English was never of any consideration until the administration of the Earl of Halifax in 1739.^b

Sec. 19. The King of France, by His Charter to the Sieur De Monts in 1603, as the Charter is recited in L'Escarbot page 417, appointed him his Lieutenant General in the territory of Acadie, to Commence at the 40th degree of northern latitude, and to extend up to the 46th.^c

^a Memoirs of Commissioners at Paris, 2^d Vol. 489; Hazard's Collection, 1 Vol. 285.
^b Douglass, [L.] 330; 2^d Hutchinson, 405, 423.

^c Oldmixon, page 21. This Charter is at large in Churchill's Voyages, Vol. 8, page 796.

Sec. 20. From the expedition of the Kirks in 1627, Sir William Alexander had the undisturbed claim to his province until the year 1630. But he had no settlements there. One Ship is said to have been sent by him which wintered at Newfoundland in 1623 and afterwards found the Bay of Fundy.^a We have no evidence that he ever improved any part of the soil or carried on any settlement there. No settlement by Alexander

Sec. 21. In the year 1630, Alexander sold the whole of the Country to Monsieur De la Tour, a subject of the French King; having first by Letters patent dated in September 1629, made him a Baron of New Scotland. He sells to La Tour

Sec. 22. A copy of the Deed is given in the words following, as taken from the Record made of it in Boston:^b

In the Name of God, Amen. Know all those who these Letter-patents shall see, or shall heare read, that vpon this present thirtie Day of Aprill, in the Yeare of our Lord One Thousand Sixe Hundred and Thirtie, before me Josh. Maynet, Notary and Tabelaion Royall, dwelling in London, admitted and sworne by the Authoritie of our Soueraigne Lord the King, and in the Presence of the Witnesses herevnder named, were present in Person, my Lord William Alexander, Knight, Lord of Menstrie, and Chiefe Secretary of State for the Kingdome of Scotland, for his said Majestie of Great Bretany, Priuy Counsellor of State, and Lieutenant unto his said Majestie in New Scotland in America, on the one part;

^a Wynne's History.

^b 3^d Book of Registry of Deeds. [The deed is recorded in the Records of Suffolk County, Massachusetts, Lib. No. 3, Folio 276, and, since the copy actually presented by Mr. Sullivan, as taken from the records at Boston, is not known to have survived and is not available, the text here given of the deed to La Tour is reproduced from Hazard's Historical Collections, I. 307-10, it being necessary for reasons hereafter stated (infra, Ch. XII) to discard the faulty copy in the records of the Department of State. The reasons for using Hazard's text are threefold: (1) Of the three printed texts of the deed to La Tour—Hazard (1792), the Suffolk Deeds (1885; III. 276-9), and the Farnham Papers (1901: Collections of the Maine Historical Society, Second Series, VII. 128-32)—Hazard's is the only one in existence at the time of the St. Croix Commission. (2) Mr. Sullivan, in the discharge of his functions before the Commission, made use of Hazard, as is shown by his repeated citation of that publication. (3) Hazard was painstaking and accurate. This is exemplified in his text of the deed to La Tour, which, although it does not undertake to reproduce the peculiarities in the writing of those who recorded the deed at Boston, faithfully reproduces the text, and essentially preserves the original spelling. The care with which Mr. Sullivan performed his duties is, however, illustrated by the fact that, in the case of the La Tour deed, he evidently sought the confirmation of the original record. This is shown by his reproduction of the final certificate of the recorder, Edward Rawson, in 1659, which is not given in Hazard, but is found in the copy in the Department of State. The copy of Rawson's certificate in the Department is, however, so faulty that I have substituted the text given in the Suffolk Deeds.]

The English version of the deed is a translation from the original French, which is recorded in the Suffolk Deeds, III. folios 272-5. While the translation is generally acceptable, it is not always so. Certain defects in it are pointed out by means of footnotes to the text here given.—EDITOR.]

who, haueing by Letters-pattents from his said Majestie, vnder the Great Seale of Scotland, the Donation of all the said Countrey of New Scotland, called by the French, the Countrey of Accadye in America, vnto him and his Heyres in Fief and perpetuall Inheritance, bearing Date the Tenth of the Moneth of September, in the Yeare One Thousand Sixe Hundred Twentie and One, he hath out of the Respect and Amitie which he beareth vnto Sir Claude de Saint Estienne, Knight, Lord of La Tour, and of Vuarre, and vnto Charles de Saint Estienne, Esq. Lord of Saint Denicourt, his Sonne, on the other Parte, the said Sir Claude de St. Estienne being present, accepting, and by these Presents stipulating for his said Sonne Charles being absent, and for their Heyres, and as well for the Merit of their Persons, and for their Assistance to the better Discouery of the said Countrey, and vpon other Consideracons, the said Lord Alexander hath giuen, and by these Presents frankly and freely doth giue vnto the said Knight de La Tour, and vnto his said Sonne, and vnto their Heyres, they seeing Cause,¹ perpetually and foreuer to dispose of as of their owne Propertie, true and loyall Acquest and Conquest, all the Countrey, Coasts and Islands, from the Cape and River of Ingogon, nere vnto the Clouen Cape, in the said New-Scotland, called the Coast and Countrey of Accadye, following the Coast and Islands of the said Countrey towards the East vnto Port de la Tour, formerly named L'omeroy, and further beyond the said Port, following along the said Coast vnto Mirliquesche nere vnto and beyond the Port and Cape of L'Heue, drawing forward fifteen Leagues within the said Lands towards the North, of all the which said Lands and Seas, the said Knight de la Tour and his Sonne, shall receive all the Fruits, Profits, Emoluments, that may provene² generally and whatsoeuer, as of their owne proper and loyall Acquest, in all Right and Jurisdiction and priuiledges whatsoeuer, as much or more then any Marquiss, Earle, or Baron holds or rayseth from the Crowne of Scotland, according to the Laws or Letters-pattents vnto the said Lord Alexander, and vnto them graunted by the Kings of Scotland, within the which Countrey, Lands and Seas aboue named, they may make, build and erect Villages, Townes, and Castles, and Fortresses, as they shall see good, which said Knight de la Tour, and his said Sonne, shall hold and enjoye all the said Countrey here aboue within the said Limitts named, from the King, and the Succession of the said Crowne of Scotland, in Fief and Title of Honor, and Right of Inheritance with³ the said Sir William Alexander to them, by Vertue of the Power to him, by the said Pattents

¹ In the original French text the phrase is "*a leurs heritiers ou ayans cause.*" Says Littré, "*ayant cause, celui auquel les droits d'une personne ont été transmis.*" This is equivalent to "assigns." Fleming & Tibbins (Paris, 1857), under "Cause," say: "*Ses héritiers ou ayans cause* (Phrase de Pratique, pour ceux à qui on a transmis son droit)—his heirs or assigns." Evidently, in place of the meaningless words "heirs, they seeing cause," the translator should have used the ordinary legal phrase "heirs or assigns."—EDITOR.

² Provene—obs. rare. . . . To come as proceeds or produce, to proceed, arise (from any source of revenue or profit). (Oxford Dictionary.)—EDITOR.

³ Hazard, in a footnote, justly comments: "I apprehend this should be *which*." In the French text there is the letter "q," evidently an abbreviation for "que."—EDITOR.

giuen, hath erected and entitled by two Barronnies, namely the Baronny of Saint Estienne, and the Baronny of de la Tour, which may be limitted and bounded equally betweene the said Knight de la Tour and his said Sonne, if they shall see cause, vpon Condition that the said Knight de la Tour and his said Sonne, as he hath promised, and for his said Sonne by these Presents doth promise to be good and faithfull Vassalls of the said Sovereigne Lord the King of Scotland, and their [footnote by Hazard "*bis*"] heyres and Successors; and to giue vnto him all Obedience and Assistance to the reducing of the People of the said Countrey, and to entertaine good Amitie and Correspondencie with the said Lord Alexander, and his Heyres, and all his Subjects which there shall be planted and resident, and shall maintaine good and faithfull Societie and Vnion, and the Respect due vnto the said Lord Alexander, as vnto the Lieutenant of the King, the said Lord Alexander promising also on his Part Amitie, Societie, Correspondency, Assistance and Protection, from his said Majestie, and from himselfe his Lieutenant. Furthermore, and ouer and above the said Lord Allexander graunteth vnto the said Knight de la Tour, and vnto his said Sonne, and vnto their Heyres and Successors and Assignes foreuer, the Right of Admiraltie in all the Extent of their said Lands and Limitts. The said Lord Allexander, and Knight de la Tour, to hold and fulfill the Contents of what is aboue, without euer in any Sort whatsoever violating thereof, and vpon the obliging of all their Goods present and to come, vpon the Penaltie of the Ordinances appointed by the Lawes established on the one Part, and the other to the Violater¹ hereof, the said Lord Allexander promising ouer and aboue, to make, or cause to be made, more ample Writing in good and due Forme, according and conformably vnto the said Letters-patents vnto him graunted by his said Majestie, whereof a Coppy collationed with the Originall, shall be giuen vnto the said Knight de la Tour, and his said Sonne; and the said Lord Alexander shall cause these Presents to be agreed vnto, and ratified by his said Majestie, vnder the Great Seale of Scotland, if Need shall require: In Witnes of the Truth hereof, there are two Writings of the same Tenor, made and indented, which each Partie hath respectively signed, sealed and deliuered, this made and passed in Martin's Lane, nere vnto this Cittie of London, in the Presence of Sir Alexander Strachan, Baronet of Thornton, George Angush, Peter James, and Richard Grimes, Witnesses hereunto called and admitted.

W. ALEXANDER. A little Seale
PETER JAMES

A. STRACHAN,
RICH. GRAMES,
The Mark A of
GEORGE ANGUSH,

A Great Seale
in green Wax affixed,
and pendant below.

¹ In the Suffolk Deeds the words are "to the violation," the phrase reading "vpon the penaltie of the Ordinances appointed by the Lawes Established on the one p^t & the other to the violation hereof." The words in the French original, in the same place, are "au contreuenenant" [contrevenant]—to the contravener, or, violator.—EDITOR.

In Testimony of the Premisses,
I the aboue named Notary being
required, have signed this present
Instrument, with my Manuall vsuall
Signe. I doe approue of these
Words (theire Heires and Rich.
Grimes) being interlined.
Endorced.

WEE the the [*sic*] Vnder-signers, doe certifie that Josh: Maynet,
who hath vnder-signed this Instrument here before written with
his owne Hand, is a Notary Royall, dwelling at London by the
Authoritie of the King our Sovereigne, sworne and admitted, and
that full Faith and Credit ought to be giuen both in Judgement
and out of the same vnto the Acts, Instruments, and other Writ-
ings by him so under-signed, made at London, the 30th Day of
Aprill, 1630.

CAROLUS DEMETRIUS, *Not. Pub.*
THO. DE WAINTER, *Not. Pub.*

This Deed before mentioned being translated hath beene read,
and compared with the Originall in French by mee, and I finde it
no Way differing in substance therefrom. 27:6:1659.

JO: ENDECOTT, *Governor.*¹

This deede so translated is Entred & Recorded in the booke of
Reccords for the County of Suffolke in New England at Request
of the sajd Joshua Scottow Attourney to S^t [*sic*] Charles de S^t
Estienne Lord of La Tour Barronet of New Scotland word for word
Compared wth the originall this 24th of August 1659

p. EDW. RAWSON *Recorder*

Sec. 23. La Tour was a French subject, but his holding this
Province as a fief of the Kingdom of Scotland could not qualify him
in any measure, for receiving the Estate. There was
La Tour not quali- then, through the Influence of the Queen, an intimate
fied by a Scottish connection and a good understanding between the
fief to hold the Estate two Crowns.

Sec. 24. By the Grant to Alexander the title passed to him, his
heirs and assigns. By the deed from Alexander to La Tour, the
Estate passed to the Latter, if he was capable of
Grant to Alexan- receiving it. If he was not capable of taking the
der considered Estate, Alexander having parted with it the whole
became the right of the Crown again. But the plan appears from the

¹ Hazard makes, in brackets, as a note to Governor Endicott's certificate, the following statement: "The foregoing *Record* has not the Signature of the Person of whom it is certified, that he is a 'Notary Royall,' but the Record of 'the Originall in French,' (which now is hardly, if at all legible, on Account of the Peculiarity of the Orthography, and numerous contractions) is signed, Joshua Maniet, Not. Pub. Cur. 1630."—EDITOR.

papers to have been founded on the Consent of the two Crowns. There was an intimate understanding between the two Courts.

Alexander in 1629, made La Tour a Baronet of New Scotland. In this he recites that La Tour had been at great expence, Labour and trouble in the business of Nova Scotia. This Instrument is recorded in the County Registry in Boston, and Copied into Hazard's Collections. The April following the deed was made of the Estate as a fief of the Crown of Scotland, which has been before recited. His allegiance was never put to the test, for very soon after the title was acquired, or supposed to be acquired, the whole Country was ceded to France.

Sec. 25. By the Treaty of Saint Germain's in 1632, Charles ceded rendered and restored to His Most Christian Majesty all the Lands occupied in New France, Acadie and Canada by His Subjects and the Command of all the Forts in Port Royal and Quebec.^a

Surrender at the
treaty of St:
Germain's

Sec. 26. Governor Hutchinson says—
That La Tour obtained a Grant from the King of France of the Bay and River Saint Croix in 1632, and that in 1634 he obtained another of the Lands of La Have and Port Royal. The Same author says—page 128, that "By the Treaty of St. Germain's, the same year, Acadie was relinquished by the English, and La Tour became dependant on the French alone."^b

La Tour's Grants
from the French
King

He had in 1637 taken a Grant of the King of France of the River St. John and ten leagues square on the same. The French nation never confirmed to La Tour, the Grant of King James, on [or] the Grant of Alexander to him; but he took new Grants for such parts as he could obtain from the Sovereign of that nation, after the cession of 1632.

Here it may be necessary to observe,

First. That La Tour was a natural subject of the French King, and that he could not change his allegiance without the consent of his own Sovereign which he never obtained.

La Tour a subject
of France

Secondly. That though King James by the emanations of his power as King of Scotland, through Sir William Alexander had made La Tour a Baronet of New Scotland, yet he never by Act of Parliament or by Letters Patents made him a subject of England or Scotland. La Tour was

Not naturalized
by England

^a *De rendre et restituer à Sa Majesté Très-chrétienne tous les lieux occupés en la nouvelle France, l'Acadie et Canada par les sujets de Sa Majesté de la Grande-Bretagne, etc.* Memoirs of Commissioners at Paris, Vol. 2, p. 6.

^b Hutchinson, page 127. [Hutchinson, I. 128.]

capable of taking but not of Holding; of consequence the King on Inquest of office had a right to have been reseized of the territory. There could be no inquest because that within two years after the Grant to La Tour the whole Country was restored to the French King, which rendered an inquest of office unnecessary and impracticable. When the whole was ceded to the English by the Treaty of Utrecht there could be no necessity for a process. The King entered under the Treaty. Alexander's heirs could not claim *Jure post Liminii* [*postliminii*] for their ancestor had parted with his title—and La Tour's heirs could not claim because they were aliens.

Thirdly. That the King of France could not have considered the title of Nova Scotia derived through Alexander as complete in La Fief

Tour because that he received it as a Fief of the Crown of Scotland and allowing him to hold it as such, would have been a dispensation to him to withdraw his allegiance from his natural Sovereign. For a Fief, or Feud, according to Spelman and others, is an allotment by a Sovereign to a Subject as a reward for services done, or expected to be done and the *Juramentum fidelitatis* or oath of Fealty is to be taken.

Fourthly. The Ancestor of the French King had claimed the Territory with all the other on the North of what was originally called New-England as the right of his Crown by a prior discovery and possession, and had as early as the year 1603, granted the exclusive right of the Peltry trade there to the Sieur De Monts whom he had Commissioned as his Lieutenant General of the whole Country. He could not therefore consider a right derived from the Crown of Scotland as valid as to a part without implicitly relinquishing his own right as King of France to the rest.

Every act done by Lewis the Thirteenth shews most explicitly—That he considered his title to that Territory as derived from his Ancestor, and that he most pertinaciously supported his claim to it.

Fifthly. La Tour, being a French Subject, a restitution to that nation was if he had a right, which was recognized by the Law of his Country, a restitution *Jure post Liminii* [*postliminii*], to him and his heirs. But he had no such right—and therefore when the territory was ceded to France it was held and possessed by that Crown without a regard to any title derived from the King of Scotland.

Sec. 27. La Tour was then an acknowledged Subject of the French King, and forever whilst he lived continued to be so. There was a Congress of Commissioners of the United Colonies of New England on the eighteenth day of July 1645. They took into Consideration

Claim & possession of France

Restitution to La Tour's country was so to him if he had a right

their situation as to La Tour and D'Aulney two Frenchmen who were then in a contention in Accadie. Those Commissioners proposed and decided Several questions on the subject.

Two questions only of those which appear on their Journal are important on the present occasion—The Characters of those Commissioners are very well known in the History of New England, William Bradford, John Endicott, Simon Bradstreet the Governor of Massachusetts, John Brown, Edward Hopkins, Richard Ludlow, Theophilus Eaton and John Ashwood.

Commissioners
of New-England
decide La Tour
to be a French
Subject

The Questions proposed and decided by them stand thus recorded on their Journal:

Quest. 1. Whether Monseur Latore being a Frenchman borne, accepting his land from the Canada Company, and of Commission of Leiftennancy of those parts from the King of France, be not concluded thereby (both in facto and de jure) to be a subject of France and to hold all his estate in Accady of the Crowne of France?

The Commissioners answered affirmatiuely.

2. Monseur Latore being knowne and concluded to be subject of the King of Fraunce, and his lands to be accounted (by Custome of all States of Europe) as belonging to that Crowne whether these confederate Colonies of New England (being strangers to that Kingdome of France and the affaires of that State) may judg of the validitie, of any of the proceeings against Latore there?

Answered negatively.^a

Sec. 28. This decision which is on the Records of Massachusetts, is of great moment in this point; for it leads us out of the necessity of reasoning on the principles of the Feudal System, as to what ought to have been then concluded, and carries us to what in fact was then concluded in the Country. It moreover furnishes us with evidence that La Tour in fact became entirely dependent on the Crown of France, and held offices and territory under that Sovereignty.

Use of the
Decision

Sec. 29. The Ground, on which those Commissioners proceeded, was fair, well known, and proper for their opinion. The Company of New France made out in 1632 a grant to Razilly who was Governor of New France of a Tract of Land at the River and Bay of Saint Croix twelve leagues wide, where the Sieur De Monts wintered, and twenty leagues into the Country,^b and in extent from the middle of the Island of Saint Croix where he wintered.

Grant of the
French to Gov-
ernor Razilly

^a 2^d Vol. Hazard, p. 51.

^b A prendre le point milieu en l'isle Sainte-Croix, où le sieur de Mons a hiverné, et vingt lieues de profondeur depuis le port aux Coquilles, qui est en l'une des

Sec. 30. In the year 1635, the Company of New-France made out a Grant to La Tour in consideration of his zeal for the Catholic Religion, granting him the Fort and Habitation of La Tour situate in New France, between the 45th and 46th degrees of northern latitude, five leagues wide and ten leagues long. The Grant recites that he was then His Majesty's Lieutenant General of Accadie. The Lands granted to him as is recited in the Grant were to be holden as a Fief of the Government of Quebec. This Grant is recited by the French Commissioners at Paris in 1750.^a This was intended to strip him of all pretence of title under the Crown of Scotland; and was on his part, a new act of fealty to the King of France. The oath of Fealty was no doubt then administered to him, as the *Juramentum fidelitatis* was a common and indispensable incident to an Investiture wherever the feudal Law was adopted.

Sec. 31. That this was not intended as a confirmation of the title derived from Alexander appears from those facts; that all the Land granted by the Quebec Company to La Tour, was but a small proportion of the lands granted to Alexander by King James and yet it was a part of the same Territory—And that the tenure was changed from a *Fief of Scotland* to a *Fief of Quebec*.

Sec. 32. In 1638, Lewis the 13th issued his Commission to the Sieur D'Aulney Charnisay, appointing him Lieutenant and Superintendant of the Coasts of the Etchemins from the mainland in the Bay of Fundy and passing on toward Virginia (meaning New England) and by the same Commission made him Governor of Pentagoet.

Sec. 33. It is not probable that Razilly was ever in America; but he did not live long after his appointment. As soon as he died a controversy arose between D'Aulney and La Tour. The Latter as Governor Hutchinson, Doctor Douglass, and other Historians say came to Boston, in order to engage the aid of the Colony of Massachusetts. The answer to this request was prudently deferred until the Opinion of the Confederated Colonies could be taken; which has been already given. In this Contest, La Tour never mentioned his claim as a Baronet of New Scotland, or as derived from a British Grant. But the controversy was—Who should be the Successor of Razilly.^b

isles de l'entrée de la rivière et baie Sainte-Croix, . . . Memoirs of the Commissioners at Paris, Vol. 2, p. 491.

^a Tenir le tout en fief mouvant et relevant de Québec, . . . Memoirs of the Commissioners at Paris, Vol. 2, p. 493; Vol. 1, 709.

^b 1 Vol. Hutchinson, 128.

Sec. 34. In February 1641, The King of France issued his orders to the Sieur D'Aulney Charnisay to arrest La Tour and to send him to France and to take an Inventory of all his Goods and with force to take all his Forts and Garrisons.^a

Order from the
King of France
to arrest La Tour

Sec. 35. La Tour's situation was clearly this, that he never claimed to be a subject of the Crown of England or Scotland, and if he had made a claim of that nature his own natural Sovereign would never have acceded to it.^b

La Tour's situation
as to allegiance

Sec. 36. This controversy was not settled between D'Aulney and La Tour, nor was the order executed. D'Aulney died 1652 and La Tour married his Widow. The Civil war in England and the consequent war between that nation and France, found so much for those nations to do in Europe that neither of them paid much attention to America. Their orders were received here with complaisance, but their authority was nearly at an end.

Order not
executed

Sec. 37. Thus the Dominions of the French King in Accadie remained until the year 1654,—when Sedgwick (who was under the Authority of Cromwell) took possession of the Country. Hutchinson in his history of this trans- action adds and others agree, that Saint Johns and all Nova Scotia were taken at that time.^c A Grant was made by Cromwell which, when considered with the Treaty of Breda, will show that all Accadie was conquered by Sedgwick. These transactions shall be considered in the next argument.

The Country taken
by Sedgwick

Grant by
Cromwell

Sec. 38. In the year 1656 Cromwell made a Grant of the Country describing it as all Accadie and a part of Nova Scotia—the words were: “The Country called Accadie, and the Country named Nova Scotia”—to La Tour, Thomas Temple and William Crowne as far west as Pentagoet and St George's River on the Confines of New England.¹ This Charter contains the usual Grants of Civil Jurisdiction and

Granted by
Cromwell to
Crowne, La Tour
& Temple

^a Monsieur d'Aulnay Charnisay, j'envoie ordre au sieur de la Tour par lettre expresse, de s'embarquer, & me venir trouver aussi-tôt qu'il l'aura reçue; à quoi s'il manque d'obéir, je vous ordonne de vous saisir de sa personne, & de faire fidèle inventaire de tout ce qui lui appartient, copie duquel vous enverrez par deçà; pour cet effet vous vous servirez de tous les moyens & forces que vous pourrez, & mettrez les forts qui sont entre ses mains, en celles de personnes fidèles & affectionnées à mon service, . . . Memoirs of Commissioners at Paris, Vol. 2, pp. 496 and 497.

^b 2^d Vol. Memoirs.

^c Hutchinson's His. Vol. 1. 183. Mem^{rs} Com^{rs} in 1750, 2 Vol. 289.

¹ See infra.

authority; but there is no reference in it to any former Grant, Claim or Title of La Tour. This Charter is found in Hazard's Collection of State papers, Vol. 1 page 616 in the French Language. Another Observation is that this Grant contains a vast extent of Country over and above what was contained in the Grant to Alexander. It came as far west as Muscongus or George's River, whereas the Grant to Sir William Alexander came no further west than Saint Croix River. It may here be observed that in the Deed of Alexander to La Tour the bounds were not the same as those in the Charter of James to Alexander. The Grant from Oliver Cromwell is of the Country of Nova Scotia or Accadie, by which he not only, by the description of the Country in the boundary of the Territory, intended to Convey all the Country as far west as the river of Saint Georges, then supposed to be the North Boundary of New England, and as far North as Canada River, and [but] further up to the 48th degree of north Latitude, which had originally been called Nova Scotia. This Grant being made in August 1656 was considered as a good Title under the Protector, but after his Death there being appearances of a restoration of the House of Stuarts, the deed of Alexander to La Tour or a copy of it was recorded in the Registry at Boston with an Intent, no doubt to induce the returning Monarch to recognize in Crowne, Temple and La Tour a Claim which had long been dormant, obsolete, and void, and evidently so considered by those who took the Grant from Cromwell of that with a vast tract of other Territory and on a new Fief or Condition. What regard was paid to this by Charles the Second will be shown presently.

Sec. 39. The Restoration happened in 1660, but Charles the Second had no wish to dispossess the French Subjects who were in

Charles 2^d did
not consider the
Grant of Crom-
well as valid

Accadie under the auspices of La Tour; at that moment there were no others but Frenchmen there.

That he did not consider the Grant of Cromwell to be of any validity, appears from his Grant to his

Brother the Duke of York, who was afterwards King James the Second, of a great part of the same Country. Though the Deed from Alexander to La Tour does not contain the boundaries exactly as they are mentioned in the Grant of James to Alexander, yet we can have no Doubt but that the whole was conveyed because Alexander's heirs never appeared to claim any part of the Country after the

Stirling's Claim
1759

Restoration nor after the Treaty of Utrecht, nor at any time until the Year 1759 when a petition for the Grant of a Province from Penobscot to Saint Croix was

presented to the King, signed Stirling, Lee and Trumble. To this no

attention was given, excepting what appeared in an alarm of the Province of Massachusetts. Governor Bernard afterwards issued a Proclamation against it as a groundless pretence of claim and which was no less obnoxious to the Crown than it was to the Province.

Gov. Bernard's
proclamation

Sec. 40. In the year 1664 Charles the 2^d granted to the Duke of York all the territory.

Grant to the
Duke of York

Beginning at a certain Place, called or known by the Name of *St. Croix*, next adjoining to *New-Scotland* in *America*, and from thence extending along the Sea-coast, unto a certain Place called *Pemaquie*, or *Pemequid*, and so up the River thereof, to the furthest Head of the same, as it tendeth Northward; and extending from thence, to the River *Kimbequin*, and so upwards, by the shortest Course, to the River *Canada* Northward.^a

This Act of Charles shews that he paid no regard to Cromwell's Charter to La Tour, Crowne & Temple. It is probable that the King had given Sir Thomas Temple some encouragement of his being continued in the Country, for in November 1668, before he surrendered the Country to Compte De Bourge [du Bourg] on the King's order made pursuant to the Treaty of Breda, he wrote a long expostulatory Letter to Lord Arlington in which among other things he says, "And the rather since your gracious word to me at Hampton Court when I took my leave of His Majesty hath in great part encouraged me" &c.^a

Sec. 41. By the Treaty of Breda anno 1667 the King of Great Britain restored to the King of France the Country called *Accadie* in North America: Whereof he, the French King, had before been in the possession and enjoyment.^b

Treaty of Breda

Sec. 42. Here it is to be observed that the words "*render and restore*" are used as expressive of the idea—That the Country was originally and formerly the right of the French Crown, and that it was a *Restoration* rather than a *cession*.

Sec. 43. The next Year after the Treaty of Breda, the Baron Castine came into the Country under the French Government.^c He was according to the Accounts given of him by Voltaire, and the Abbé Raynal a man of Great consideration in his own Country. He settled amongst the Indians

Castine

^a Smith's History of New York, page 10.

^b Le ci-devant nommé Seigneur le Roi de la Grande-Bretagne restituera aussi & rendra au ci-dessus nommé Seigneur le Roi Très-Chrétien, ou à ceux qui auront charge & mandement de sa part, scellé en bonne forme du grand-sceau de France, le Pays appelé l'Acadie, &c. (Vide Treaty in Memoirs.) Com^{tes}. 2 Vol. p. 35, 1750.

^c Hutchinson, Vol. 1, 364.

—on Penobscot River where a Fort built by him retains his name to this day The corporate name of the Town there keeps up his memory. He remained there until 1696.^a

It cannot be of use here to mention the names of the various Governors appointed by the French Crown over the territory of Acadie because it will be an undisputed fact that they continued in the full possession of all the Country north and east of Penobscot River, from the Treaty of Breda to the Year 1690; and that their claim was uniformly extended to the River Kennebeck which they considered as the northern limits of New England exclusive of New Scotland.

Sec. 44. In the Year 1690 Sir William Phips attacked and took the Fort at Port Royal which was the principal Garrison then held by the French in Nova Scotia. He also conquered the whole Country as far west as Penobscot-River.^b In all this time we hear nothing of La Tour's Claim; It appears clearly to have been silenced by the Treaty of St Germain's in 1632, and tho' a grant was made to him, Crowne & Temple jointly in 1654, Yet we hear nothing of that, after the Treaty of Breda.

Sec. 45. If the Province of Nova Scotia by Deed to La Tour was the private property of a French Subject it would have been claimed by La Tour upon the Treaty of St Germain's. If by the Grant of Oliver Cromwell it had been La Tour's property as an English Subject, he would have claimed it, and Sir William Alexander's right in either way, must have been totally extinguished.

Sec. 46. In the year 1697, not long before the Treaty of Ryswick, William Crowne exhibited a petition to The Lords of Trade and Plantations.^c That Petition was founded on the Grant to Alexander as appears by an extract of it in the Memoirs of the Commissioners at Paris in 1750. But unless Crowne considered that Grant as connected with that of Oliver Cromwell, it cannot very well be seen how he could have a connection with it himself. This petition is not all copied into those Memoirs nor can a full copy of it be at this time obtained. There was no Notice taken of it by the Board to whom it was exhibited nor has the Government of England paid any attention to it from that time to this. In the year 1697, John Nelson who claimed as devisee of Sir Thomas Temple petitioned the Lord Justices of England for a

^a Hutchinson, Vol. 2, 93.

^b 1 Hutchinson, 397. [The name Phips, *supra*, is also spelled Phipps; sometimes the same author uses both spellings. Savage, Genealogical Dictionary, III. 419, says: "Phips or in modern days, Phipps."—EDITOR.]

^c Memoirs Com^{rs} 2 Vol. 281.

Restoration of Nova Scotia,^a averring that the same was granted to the said Sir Thomas by La Tour. His petition contains many expressions of expence and sufferings; amongst others that he has pursued his Interest into France, where they paid no other attention to it than by throwing him into prison for the space of five years. There was no attention paid to this application in England nor is there any evidence of the fact he asserts of a conveyance from La Tour to Temple. Such a conveyance would have been incompatible with the Charter of Cromwell who Granted the Territory to La Tour, Crowne & Temple, without regard to the Charter of King James to Sir William Alexander or to the conveyance from Alexander to La Tour.

Sec. 47. In 1697, the King of England surrendered the Country to the King of France by the Treaty of Ryswick.^b

Treaty of
Ryswick

Sec. 48. The Agent for the United States has been thus particular in his relation of these facts in order to prevent confusion in the history of the Country of Accadie, both as to its conquest and Boundaries. The various Revolutions of Government under which it has been vexed he has thought would be necessary to be brought to view in order to shew clearly that the Grant to Sir William Alexander was considered as a mere nullity from the Treaty of St Germain's in 1632, and that the Boundaries described in it wherever they might be were never attended to by either nation after that period.

Sec. 49. There are some particular circumstances respecting the grant in 1664, (prior to the Treaty of Breda) to the Duke of York which might have been mentioned in this Argument, but they will be placed as aptly in the next.

Sec. 50. Upon these considerations and on a view of these facts the Agent of the United States conceives that he may by a few observations and deductions bring his arguments on this head to a close with great advantage to the justice which is due to the United States in this controversy.

Alexander sold to
La Tour

Firstly. That if the Province of Nova Scotia which was granted to Sir William Alexander by James the first included the territory in question; yet that Alexander exonerated himself of the property by his deed of cession to La Tour in April 1630.

Alexander
conveyed

^a This petition is found in the Memoirs of the Commissioners at Paris in 1750, Vol. 2. 330.

^b Treaty of Ryswick. Art. 7. "Rex Magnæ Britanniæ restituet domino Regi Christianissimo omnes regiones, insulas, arces et colonias ubivis locorum sitas quas possidebant Galli ante dictam ejusdem belli declarationem," &c.

Secondly. That to continue it as a Charter to or a Province of Alexander it must have been done by grant from La Tour to some other person, but there is no pretension that the province is now claimed as derived through La Tour to the Crown of Great Britain or to any other person.

No claim pre-
tended under
La Tour

That the Grant being made tho' with the consent of the King to a subject of France, with powers of Governments, it must have been altogether nugatory and void, or else have operated as a cession by Treaty; because that by the Feudal Law, aliens could not hold by grant either from sovereign or subject. And even if La Tour had an Estate in the Province it could be acquired by the King of England in right of Conquest, as against an enemy.

King could ac-
quire La Tour's
property by
Conquest

Thirdly. That if the conveyance of Sir William Alexander was valid, La Tour was to take it as a Fief of the Crown of Scotland. It was a territory, property and jurisdiction which might be ceded by the Crown of Scotland upon a Treaty with another nation.

Fourthly. That such a Cession was in fact made by the treaty of St Germain's in 1632.

Fifthly. That when the Country was again conquered in 1654, the title and estate could not revert to Alexander *Jure postliminii* because he had parted with it before the Treaty which surrendered it to France.

Sixthly. That on the Treaty of Breda the right resulting from Cromwell's Grant to Crowne, La Tour and Temple, if it had any efficacy in it was lost again, La Tour having before, as Governor Hutchinson says and as all the history of the Country in those times assures us, become entirely dependent on the Crown of France, and having taken grants of a part of the Country from the French King.

Seventhly. That when there was a reconquest in 1690, Crowne, La Tour and Temple were not considered as having any right to it, and this was perhaps because all Grants and Charters made during the *interregnum* were considered as void *ab initio*.

Eighthly. That in the Conquest of 1690 the Crown of England being seized of the Country without incumbrance granted it to the Province of Massachusetts Bay. Which is the object of discussion in the succeeding part of the argument.

Ninthly. That by the Treaty of Ryswick in 1697, the whole was ceded to France by means whereof the right to the territory and jurisdiction was suspended as to the Massachusetts until the reconquest in 1710. And after which it was confirmed by the treaty of Utrecht in 1713.

Tenthly. That by the Grant of King James the first to Sir William Alexander, the powers of Civil Authority were granted to him, as his Majesty's Vice Roy. These powers were never vacated by process in chancery, or in any other manner, nor was the Charter as to the Land title ever by a formal process vacated. And yet the heirs of Alexander have now no pretence of claim; nor is the Grant of the Crown to Sir William Alexander on which the claim of Boundary for His Britannic Majesty is predicated considered by the Agent for his Majesty as being in force.

Eleventhly. Even if the claim under that Charter could be supported as resulting from reversion or conquest, it could not be considered as giving a right to the King of England or Scotland in his private person; and if it reverted to him in his Royal Prerogative it did not revert as remaining a separate Province or territory but was immersed in the Crown-right and held again as an undistinguished part of his Dominions until he should recreate the Territory into a Province or Colony by an act of State. If this has been done the Agent for His Majesty can exhibit the Documents properly evidential of it; and shew how it is connected with the present Controversy.

Twelfthly. If it has not been done then the two Nations who concluded the Treaty of peace in 1783 had before them a Country in common, without regard to any former Act or process to settle a line, but were left to settle one as they could agree upon it, in the same manner as the lines on the North and northwest parts of the United States were settled and agreed upon at that time.

Sec. 51. The Agent for the United States is aware that an answer to this Argument may be attempted by saying that the existence of a province called Nova Scotia is explicitly recognized in the Treaty of 1783, because the first line of boundary is drawn from the northwest Angle of a Province of that appellation.

Anticipation of
an answer

Sec. 52. But the proposition of the Agent for the United States is, "That there was not when the Treaty of Peace was made in 1783 any Province called Nova Scotia—founded on the Grant of King James to Sir William Alexander."

Sec. 53. That there was a Territory called Nova Scotia at that time is not disputed, but the limits and boundaries of it were then unknown, and therefore it became necessary to give it a Western Boundary by the Treaty itself in these words, "viz: That Angle which is formed by a line drawn due north from the source of the River Saint Croix to the Highlands."

The same, that
the treaty of 1783,
originated the
boundary of
Nova-Scotia

Highlands not
explored

Sec. 54. The Highlands had in the year 1763 been made the boundary of Quebec, or the Lower Canada Boundary; but where the Boundaries or the Highlands are is yet resting on the Wing of imagination.

Sec. 55. Another reason why the Charter to Sir William Alexander might be considered as of no force, was that all the Grants made by King James of the northern part of the Continent appear to have been abandoned or rather given up or surrendered at a very early date. There was so much confusion in their boundaries arising from a want of information that it became necessary to relinquish these and to take out new Charters under his Successor.

Charter of King
James given up,
& why

The Charters afterwards made, refer to the Charter of James to the New England Corporation: but this is done with no other intention than that of keeping up the claim of the English Crown against the French Nation.

Though all the Country from the 40th to the 48th degree of northern Latitude was granted 1620 by King James to the New England Company, yet he granted in 1629 the Colony of Massachusetts to Sir Henry Roswell and others. That Charter is printed in Hutchinson's Collection of State papers.¹

In April 1635 the Council for the affairs of New England resigned their Charter^a and there was an attempt made at that time to bring on a dissolution of the Charter made to Massachusetts; but being made by Charles the First it was not given up. On the same day that the New England Council resigned their Charter, a New Grant was made to Mason of New Hampshire^b and afterwards in 1639, Sir Ferdinando Gorges took out a new Charter for the Province of Maine.

New Grant to Ma-
son and Gorges

Mr Hubbard in his history published in the Year 1680, says—That when the division of the Country was made in 1639 between the Duke of Lenox and others, (which agreement is in Georges History),² that the Country from Pemaquid to Saint Croix was assigned to Lord Stirling. This was done perhaps under an idea of his surrendering his right if he had any but more

To Lord Stirling

¹ See Hutchinson Papers II. 1, where the text is given of the charter granted by Charles I, March 4, 1629, "to Sir Henry Rosewell, Sir John Young, knights, Thomas Southcott, John Humphrey, John Endecott and Symon Whetcomb, Their heirs and associates forever."—EDITOR.

^a This Resignation is at length in Hazard's Collections and mentioned in all the Historians of the Country. Hazard, [I.] 390.

^b New Hampshire Records, copied by Hazard. [I. 383-94.]

² It is so in the copy of 1798, but "Georges" evidently means Sir Ferdinando Gorges. Gorges published several books; but, that the one here meant may be the volume published by him in London in 1658, under the title "A / Briefe

probably because he had carried the design of the thing into execution and effect, by placing the Territory granted to him in 1621 in the hands of the French nation to gratify Charles and the French Queen. Be this conjecture as it may, yet if we depend on this part of History, and no one can be depended on with more safety than Hubbard, we cannot but believe that from the conveyance to La Tour, the Treaty of St. Germain's, and the general wreck of Colonial Charters in 1635, the Province of Sir William Alexander ceased to exist. What became of that Nobleman's family in the Civil War, which soon after the year 1639, convulsed the English Government, or what part he took in that unhappy controversy is not material to our business.

The original Charter to the Colony of Massachusetts from the Council for the affairs of New England was founded on the grant of King James, and confirmed by Charles and so was Charter to
Massachusetts by
James & Charles that of Mason and Gorges, but before the Council which held the Land to the 48th degree of Latitude

had resigned their patent, Alexander had conveyed his province of Nova Scotia to a subject of France, and the territory had been restored and ceded by the Treaty of St Germain's to the French Crown. Had that Conveyance and that Treaty never taken place the Charter to Sir William Alexander would have been treated

like the others. But it appears to have been com- Alexander's
charter abandoned pletely abandoned by Sovereigns and Subjects, as a

mere Utopian Scheme, as a subject involved in doubts, disputes and controversies, as having been originally made as a pretended Compliment to the Scotch Nation but as a real benefit to the French Crown, as an act of a Sovereign against the Inclinations of his Subjects at large, as an attempt of the King to support the French claim whilst all his Subjects urged on [by] an enthusiasm for discovery and possessions were contending against the French Crown for the Territory of North America. There can be no wonder then that the whole project was treated by the English Nation with neglect & indifference.

Sec. 56. That the whole of the Country as far as the River and Gulph of Saint Lawrence was then the territory of the Province of Massachusetts, will be shewn in the Succeeding The Country
granted to Massa-
chusetts argument; and had the King of Great Britain acknowledged the Independence of The United States without limitation or extent, or description of boundary, they would

Narration / of the Originall Undertakings / of the / Advancement / of Plantations / Into the parts of / America. / *Especiallly,* / Shewing the beginning, progress / and continuance of that of / New-England," may be inferred from the circumstance that Mr. Sullivan, in quoting elsewhere from that volume a statement of the purport of the agreement of 1639, cites it as "Gorges' History, 44 and 45." Sullivan's History of the District of Maine, 122-3.—EDITOR.

have extended to the Gulph and River Saint Lawrence on the north and east, and some of them to the South Sea on the west.

The Bounds therefore were given as necessary to preserve the British Empire in America.

Sec. 57. If the Commissioners of 1783 had been in any way governed by or had paid any attention to the Grant of King James to Sir William Alexander, they would have expressly referred to it. But they were so far from considering that Charter as a guide, that the Boundaries given in the Treaty are, even if the Scoudiac is the River intended as the boundary, very different from his boundaries if he came as far west as that River.

The Commission-
ers of 1783, paid
no attention to
Alexander's
charter

His Grant not only comprehends the whole River but goes to its most western Waters; whilst the boundary in the Treaty goes on the Middle of the River to its source, dividing the Saint Croix between the two Nations.

SECOND PART

That—By the Charter of William and Mary in 1691, to the province of Massachusetts Bay, the whole of the Country and Territory between the river Sagadahock or Kennebeck, and the Gulph and River of Saint Lawrence, including what is now Nova Scotia and New Brunswick was granted to that province; and that no line of division, bounds of restriction, or settlement or division of Territory, between what is now the province of New Brunswick, and the late province or State of Massachusetts, was expressly made or had, by compact, or order of Government, prior to the Treaty of Peace in 1783.

Sec. 1. The Agent for the United States expects that it will appear by the Statement of claim exhibited before your honorable Board and by the evidence in the cause, that the Claim of the United States is founded in Grants of His Britannic Majesty's Royal Predecessors; and he therefore concludes That there can be no necessity to prove that their Majesties had authority to make the Grants or Charters, which may be exhibited or referred to.

Charters of
Charles

Sec. 2. His Royal Majesty King Charles the First, by his Letters patents, on the fourth day of March in the fourth year of his reign, granted and confirmed to Sir Henry Roswell, Sir George Young, Sir Richard Saltonstall, and others all that territory and Land in New England in America lying between a great River called the River Merrimack, and a certain other River called Charles River—being in

the bottom of a Bay called Massachusetts Bay, and all the Lands lying within the space of three English Miles south of the said Charles River or of every or any part thereof—and all the lands lying within the space of three English miles to the northward of the said River Merrimack and of any and every part thereof and did make them the said Sir Henry Roswell, Sir George Young, Sir Richard Saltonstall, and others in the same Letters patent named and all such others as should thereafter be admitted of their company, One Body corporate and politick, by the name of The Governor and Company of the Massachusetts Bay in New England; with full and ample powers as a Body politick and Government.

Sec. 3. Their Royal Majesties William and Mary late King and Queen of Great Britain in the third year of their reign Anno Domini 1691, by their letters patent of that date, did will, grant and concede that the territory commonly called ^{Charter of William and Mary} the Colony of New Plymouth, the lands so as aforesaid granted to the said Sir Henry Roswell and others, the territory called the province of Maine, the territory called Accadie or Nova Scotia and all that tract of Land lying between the said Country or Territory of Nova Scotia and the said province of Maine, should be erected, united and incorporated, and their said Majesties, by the same letters-patent did unite, erect, and incorporate the same into one real province, by the name of The province of the Massachusetts Bay in New England. And that certain powers authorities and privileges were granted by their said Majesties to the Inhabitants of the same province their heirs and successors, in force and virtue whereof, the said inhabitants, their heirs and successors, in their political and corporate capacity aforesaid could receive and hold, as well real property in fee simple, or in lesser estate, as personal property, goods and chattels and exercise legislative Civil jurisdiction over the same Territories.

Sec. 4. That their said Majesties William and Mary, in and by their Letters-patent aforesaid, did for themselves, their heirs and successors give and grant unto the said inhabitants of the said province and to their successors, all that part of New England in America, lying and extending from the great River commonly called Monomack alias Merrimack, on the north part, and from three miles northward of the same river to the Atlantic or western sea or ocean, on the south part; and all the lands and hereditaments whatsoever, lying within the limits aforesaid, and extending as far as the outermost point, or promontories of land called Cape Cod and Cape Malebar, north and south in latitude, and in breadth, and in length, and Longitude, of

and within all the Breadth and compass aforesaid, throughout the Province of Maine mainland there; from said Atlantic or Western sea and ocean, on the east part, towards the south sea. And also all that part and portion of mainland beginning at the entrance of Piscataqua Harbour, and so to pass up the same into the river Newichewanock, and through the same, into the furthest head thereof; and from thence northwestward till one hundred and twenty miles shall be finished and from Piscataqua Harbour mouth aforesaid north eastward along the sea Coast, to Sagadahock; and from the period of one hundred & twenty miles before reckoned, up into the main land from Piscataqua Harbour thro' Newichewanock river. And also the Lands and hereditaments lying and being in the Country or territory called Accadie or Nova Scotia; and all that tract of Land and hereditaments, lying and extending between the said Country or Territory of Nova Scotia and the said river Sagadahock, or any part thereof. With all the Rivers, waters, havens and ports, lying within all the territories so granted as aforesaid, And all the Islands and Islets, lying within ten leagues opposite, to the bounds of the mainland, of the same granted territories aforesaid. All which is fully exemplified by the same Charter produced before your honorable Board.

Sec. 5. The Agent for the United States further suggests, That on the fourth day of July in the year of our Lord one thousand, seven hundred and seventy six, the said province became a Free Sovereign and Independent State, by the name of the State of Massachusetts, and in consequence thereof, was the Legal Successor of the said province of the Massachusetts Bay in New England. And that the same afterwards, on the twenty-fifth day of October 1780, assumed the name and style of The Commonwealth of Massachusetts, and by that name became the rightful and constitutional successor of the said province and State; as appears by the Constitution thereof here now exhibited to the Honorable Board.

Sec. 6. That the same Commonwealth on the first day of January in the year 1783, was, and until the year 1789, continued to be in Confederation, united with the States of New Hampshire, Rhode Island and Providence plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina & Georgia, all which States were, and before had been Free Sovereign and Independent States.

Sec. 7. That on the Third day of September, anno Domini 1783, a Definitive Treaty of peace was concluded between His said British Majesty, and the said Confederated and United States in which by the high contracting parties Treaty of Peace thereto it was agreed, stipulated and declared, that the following then were and thereafter should be, the boundaries of the same States, to wit: From the Northwest Angle of Nova Scotia, viz., That angle which is formed by a line drawn due north Boundaries of the States from the Source of *The Saint Croix River* to the high-lands, and along the said Highlands which divide those rivers that empty themselves into the river Saint Lawrence, from those which fall into the Atlantic Ocean, to the northwesternmost head of Connecticut River, thence down along the middle of that river to the forty-fifth degree of north Latitude: From thence by a line drawn due west on said Latitude until it strikes the river Iroquois, or Cataraquy; then along the middle of said river into Lake Ontario, and through the middle of said Lake until it Strikes the Communication by water between that Lake and Lake Erie; thence along the middle of said communication into Lake Erie and through the middle of said Lake until it arrives at the water communication between [that lake and Lake Huron; thence along the middle of said water communication into the Lake Huron; thence through the middle of said lake to the water communication between that lake and Lake Superior; thence through] Lake Superior northward of the Isles Royal and Phelipeaux to the Long Lake, thence through the middle of the Long Lake and the water communication between it and the Lake-of-the-Woods to the said Lake-of-the-Woods, thence through the said Lake to the most northwestern point thereof, and from thence on a due west course to the River Mississippi, thence by a line to be drawn along the middle of the said river Mississippi, until it shall intersect the northernmost part of the thirty first degree of north latitude. South by a line to be drawn due east from the determination of the line last mentioned, in the Latitude of thirty-one degrees north of the Equator, to the middle of the river Apalachicola, or Catahouche; thence along the middle thereof to its junction with the Flint river, thence strait to the head of S^t Mary's river, and thence down along the middle of Saint Mary's River to the Atlantic Ocean. East by a line to be drawn along *the middle of Saint Croix River from its mouth in the Bay of Fundy to its source and from its source directly north to the aforesaid Highlands*, which divide the rivers that fall into the Atlantic Ocean from those which fall into the River S^t Lawrence, comprehending all the Islands within twenty leagues of any part of the shores of the said United

States lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy & the Atlantic Ocean, excepting such Islands as then were, or theretofore had been within the Limits of the said Province of Nova Scotia.

Province of
Maine, sold to
Massachusetts

Sec. 8. The Agent for the said United States further suggests, That when the same Charter of William & Mary was issued in the year 1691, there was a territory or Country in America called the Province of Maine, which had before been granted by the English Crown to Sir Ferdinando Gorges, bounded westerly by the province of New Hampshire, easterly by the River Sagadahock or Kennebeck, southerly by the sea and extending one hundred and twenty miles into the Country *northward*; which said province of Maine had previously to the said Charter of William and Mary, been conveyed by the heir of the said Gorges, to the said province of the Massachusetts Bay.

Territory between
Acadie and
Maine

Sec. 9. That there was also a tract of Territory lying between what was then called The Province of Maine and the territory called Accadie, or Nova Scotia, and extending from Sagadahock, eastward beyond the River Penobscot, and into the Country northward to the Confines of Canada.

Acadie or
Nova-Scotia

Sec. 10. That the same country or territory called Accadie, or Nova Scotia, as mentioned in the same Charter, was bounded west by the said territory last mentioned, southerly by the sea or Atlantic Ocean, and easterly and northerly by the river and gulph of S^t Lawrence.

Territory between
Maine and Acadie
not noticed

Sec. 11. The Territory between said Accadie, and the province of Maine, being out of this case, need not be noticed.

Authorities
attended to

Sec. 12. To describe and support by evidence, the boundaries of the Country called Accadie or Nova Scotia, mentioned in the provincial charter of Massachusetts, it will be necessary to attend to some authorities and to ask leave to make some observations on their force and applicability in the present Investigation.

Charter an
authority

Sec. 13. The Instrument under consideration which renders our enquiries necessary and pertinent, may with great propriety, be resorted to for aid in the question upon its own construction.

Sec. 14. By that Charter the province was authorized to grant and dispose of all the Lands in the old Colony of Massachusetts, the Colony of Plymouth and Province of Maine but no such power was

granted as to the Lands between Sagadahock and the river and gulph of S^t Lawrence. In the three first the Grants of the Province were efficacious, by its own authority but in the last the grants were not valid without the consent of the Crown.

Grants not valid
without consent of
the Crown

The Words of the Charter are:

No grant or grants of any lands lying or extending from the river Sagadahock to the gulph of S^t Lawrence and Canada river and to the main sea northward, or eastward, to be made by the Governor and General Assembly of the said province, shall be of force, validity or effect until their said majesties, their heirs or successors shall have signified their approbation of the same.¹

Quotation from
the Charter

Sec. 15. By these words, the expression Accadie and Nova Scotia as used in the Charter are fully explained. The mode of expression further shews that the entire jurisdiction and the qualified property of all the country, to the river of Canada, and gulph of Saint Lawrence were vested in the province of Massachusetts Bay. The peninsula which is now the province of Nova Scotia was as clearly within the Charter, and at that time understood to be so, as will presently appear beyond any controversy or dispute.

Nova-Scotia
included

Sec. 16. From the various Acts of Government, as well [as from] Treaties or other proceedings, which have been already mentioned, by the Agent for the United States under the first head of his argument, it will appear, that the Country now in question was always until after the Charter aforementioned was issued, known by the name of Accadie.

Country known
by the name of
Acadie

Sec. 17. The Agent for the United States begs leave to ask the attention of the honorable Board to several Instruments, to which he has already referred them on other points, for light and information on this.

Reference to
papers before
offered

Sec. 18. The Charter of Henry the 7th 2 of France in 1603, to the Sieur De Monts of the Country of Accadie has been mentioned in another point.

De Mont's Charter
beforementioned

Sec. 19. By what means or from what circumstances that part of New France which is south of the River S^t Lawrence and north of what was originally New England was called Accadie, is not now known, nor is it material to enquire into it on this occasion. The reason for the whole being

No need of en-
quiry into the
name of Acadie

¹ These are not the exact words of the charter, but the version is substantially correct. See Poore, Charters and Constitutions, I. 953.—EDITOR.

² It so looks in the copy of 1798, but we should give the copyist the credit of having intended to write 4th.—EDITOR.

called Nova Scotia, has been already suggested, and is very natural.
 Sec. 20. That the Kirks demanded the whole
Kirk's demand in 1628 by the name of Canada and Accadie, has
 been observed.

Sec. 21. The Honorable Board will please to refer themselves to
 the Commission of the King of France in 1638, to the Sieur D'Aulney
 Charnisay, as his Lieutenant General of the Country
Grant to of the Etchemins from the middle of the Bay of
Charnisay Fundy to Virginia meaning north Virginia or New
 England and Governor of Pentagoet and all the Country to Cansceau
 Strait, under the appellation of Accadie.^a

Sec. 22. The Grant of Cromwell to La Tour and others in the year
 1656, was of a Territory called Accadie, bounded on the east by the
 Gulph of St Lawrence, on the west by the river
Cromwell's Grant Pentagoet and extending from the sea Northward to
to La Tour the forty-eighth degree of northern Latitude.

Sec. 23. The Treaty of Breda in 1667 restored to
Treaty of Breda France the same Country, under the name of Accadie
 or Nova Scotia.^b

Sec. 24. The Treaty of Utrecht surrendered to The Queen of
 England the Country of Accadie or Nova Scotia, according to its
 ancient limits. On this Treaty the Nations both
Contention of the agreed that Accadie or Nova Scotia comprehended
French and Eng- the now province of Nova Scotia, and the English
lish on the mean- contended that it comprehended the whole of the
ing of Acadie Country from Penobscot river to the River of Canada and the Gulph
 of St Lawrence. The whole of this controversy is in the Volumes of
 the Memoirs of The Commissioners at Paris in 1750 and in the three
 succeeding years.

Sec. 25. That after the Charter of 1691 the prov-
Government ince of Massachusetts claimed the Government over
extended there that Territory will appear from several facts which
 are well authenticated.

Sec. 26. There were indeed but very few Inhabitants besides
 French and Indians in the Country: The former were unwilling
 subjects of an English Government and the Latter
Few people there were much devoted to the French and readily hostile
 to the English people.

^a“ Mon Lieutenant général en la côte des Etchemins, à prendre depuis le milieu de la terre ferme de la Baie Française, en tirant vers les Virginies, & Gouverneur de Pentagoet; et que la charge du sieur mon Lieutenant général en la côte d'Acadie, soit depuis le milieu de ladite Baie Française jusqu'au détroit de Cansseau.” Mem. Com. 1750, 2d Vol. 495.

^b Memoirs de Comm^{rs} at Paris, 2 Vol. 512, & Treaty of Breda.

Sec. 27. Governor Hutchinson tells us, Vol. 1 page 397 that

Massachusetts considered Nova Scotia as a part of that Province, and had issued Commissions and Instructions to persons for the exercise of Government there. That all the Land between the province of Maine and Nova Scotia was uninhabited except at and Near Pemaquid, where there were a few scattering English habitations on the principal rivers. On Penobscot, Machias, and Norridgewock there were Indian Wigwams. The bounds of this vast Country or Territory were understood to be the river of St. Lawrence on the north, the Colonies of Rhode Island and Connecticut on the south, and the South-Sea on the West.¹

Massachusetts
Claim from
Hutchinson

Sec. 28. He further says, that in 1691 one Nelson was by the Province appointed Governor of the Territory of Accadie & Nova Scotia but that he was opposed in the exercise of his Government by Monsieur Villebon, who then claimed Authority there under the French King.^a

Nelson made
Governor

Sec. 29. Hutchinson was the only historian who had occasion to treat on this subject; he in his second volume page 90, says:

We have already taken notice² of Nova-Scotia although included in the bounds of the Massachusetts charter; the inhabitants in general, for several years having been under the power and command of the authority sent from France: But, this year [1696], the affairs of that, and of the other parts of the government are more interwoven.

Nova Scotia
within
Massachusetts

Sec. 30. After the conquest of that province, by the Massachusetts colony in 1690, the French in Europe gave themselves but little concern about the recovery of it, and the English as little about its preservation or security. The Massachusetts were unable to bear the charge of a sufficient military force, to keep the inhabitants in subjection:

Government
exercised there

¹ The foregoing passage, which appears in the State Department copy as a quotation from Hutchinson, is not in textual conformity with any of the editions of his history, but is in the nature of a paraphrase, in which various words are substituted for the words found in Hutchinson. The passage as found at pp. 13-14, Vol. 2, of the third edition of Hutchinson, 1795, reads as follows: "The Massachusetts colony had considered the inhabitants as a part of the colony, and had given commissions and instructions to persons for the exercise of government there. All the lands between the province of Maine and Nova Scotia were uninhabited, except at and near Pemaquid, where there were a few scattering English; and upon the principal rivers, the Penobscot, Machias and Norridgewock Indians had their wigwams. The bounds of this vast territory were understood, to be the river St. Lawrence on the north, the colonies of Rhode Island and Connecticut on the South, the Atlantic on the east, and the South Sea on the west." This passage, with no substantial difference, may be found at page 6, Vol. 2, of Hutchinson's second edition, and also at page 6, Vol. 2, of the first edition. Some of Mr. Sullivan's citations show that in certain instances he used the third edition and in others the second. For comments by Mr. Chipman on Mr. Sullivan's Section 27, see *infra*.—EDITOR.

^a 2 Vol. 90.

² A misquotation here is later corrected.—EDITOR.

They gave commissions to judges, justices and other officers, and required oaths of fidelity; and, in 1691, gave power and authority to Mr. Nelson, who was bound there from Boston upon a trading voyage, to be commander in chief in Acadie; but when he came near the river St. John's, he was taken by Mons. Villebon, who, having a commission from the French king, had been in to Portroyal and ordered the English flag to be struck and the French flag to be hoisted there, but intended to make St John's, the place of his residence, and took possession of it, where he carried on great trade with the Indians. &c.^a

Sec. 31. The fact being established that the whole Territory as far as Canada River and the Gulph of St Lawrence, was within the Charter of William and Mary to the province of Massachusetts Bay in New England, and by that Instrument made the qualified property of that Corporation, it might be proper for the Agent of the United States to stop here, and call upon the Agent for His Britannic Majesty to shew that there was ever a restriction of boundary made prior to the Treaty of peace in 1783.

Sec. 32. But the Agent for the United States having taken upon himself the affirmative of the proposition, that no such Boundary was ever made, he is willing however unnecessary it might otherwise be, to proceed in this business, by affirmative facts, to enforce the negative proposition which he has had the honor to submit.

Sec. 33. The Question may be proposed by the Agent for His Majesty, or it may be proposed by this Honorable Board, Why the eastern extent of Massachusetts was ever supposed to be at a Place, Bay or *River* called *Saint Croix*, unless that was in fact the Boundary? And again, Why should the place or River St Croix have been anciently considered as a Line of boundary unless that by some agreement or practical line there was a common consent that the boundary should be at that place?

Sec. 34. These Questions are very important, and as a proper answer to them will tend to cast light upon the subject under the consideration of the Board, it is equally the duty of the Agent for the one or the other nation to answer them.

Sec. 35. The Agent for the United States will readily offer such facts, and raise such Arguments to this purpose, as are within his possession and ability.

^a 2^d Vol. Hutchinson, p. 90, [2nd ed.; p. 87, 3rd ed. It is "Massachusets" in the 2nd ed.; "Massachusetts" in the 3rd.—EDITOR.]

Sec. 36. He observes in the first place that, if there were any Acts, Agreements, or Charters, by which the province of Massachusetts Bay relinquished the Lands on the north of the province of Maine, or any process, by which that province was divested of its property and jurisdiction therein, the Agent for his Majesty will exhibit evidence of the same to the Board.

Agent of His
Majesty to exhibit
evidence

Sec. 37. That an idea or supposition prevailed soon after the treaty of Utrecht, that the right of Massachusetts was not to be *continued* to the soil as high up as Canada River is agreed. But that this supposition or idea shall have its true weight, and no more, it is necessary to have it understood upon its proper facts and true principles.

Idea of St Croix
being a Boundary

Sec. 38. There were two parties in this business, which acted upon separate Interests and with separate ideas and expectations.

Suppositions &
interests of
parties

The ministry believed that the Country on the north of the province of Maine was granted to the Massachusetts merely with an intention to support and continue the claim of the Crown of England against the French King; and that, therefore, although there was a grant of the soil yet that grant could not be taken advantage of, without the consent of the Crown. And yet, that it was necessary to extend some kind of Jurisdiction over it in order to defend the claim to it against the encroachments of other Nations.

There were no people there but the French and Savages devoted to that nation. It could not be readily peopled by English Families, and therefore a grant to Massachusetts was the only proper expedient to support the English claim and to save the expence of a Government where there were no subjects to pay it.

Sec. 39. The Massachusetts, on the other hand considered the grant as vesting a property in it, as a Corporation; that the defence of the territory was by the Charter devolved on them and were really at great expence for its defence and support.

Views & inter-
ests of Massa-
chusetts

Sec. 40. The Agent for His Majesty can by no means contend, that a recollection of the Grant to Sir William Alexander or the ideas of the boundary of Nova Scotia would raise an opinion that the Charter of the Province of Massachusetts after the year 1691, did not extend east of the province of Maine, or of Sagadahock River; or that any part of it was void on account of a supposed interference with a former Charter.

That the patent
of Sir Wm. Alex-
ander did not
suggest the
Boundary

Sec. 41. That an idea prevailed in the Court of London, at a very early day, of restricting the Charter, will appear from a variety of circumstances, which will serve to shew, that there was a want of consistency, or, at least, a want of information in the Board of Trade & Plantations, at, and soon after the date of the Charter of William and Mary.

Sec. 42. That Charter was issued in 1691,—and by the Treaty of Ryswick in 1697, The King of England *restored* to The King of France, all the Regions, Islands and Fortresses, wherever the same might be which were possessed by the French King, or his subjects, before the declaration of the then late war.^a Upon this Treaty the province of Massachusetts must have been greatly alarmed.

The Old Colony of Plymouth was incorporated into the Province, which gave a union of interests between the two. That Colony had claimed a large Tract of Country, in virtue of a Grant from the Council for the Government of New England in 1629, on both sides of the river Kennebeck or Sagadahock, thirty miles wide, and extending a great distance up the River. This tract had been purchased by men who possessed a great share of influence in the province, Tyng, Brattle, Boies & Winslow.^b

Another great tract of Country thirty miles square, on Penobscot River was held under the Grant of the same Council to Beauchamp, and Leverett^c whose heirs and assigns were also people of great influence. There were a great number of proprietors claiming Lands there under other patents, and under Indian deeds approved by the Government.

The French claimed by virtue of their Late King's Grant to Monsieur De Monts the Country as far south as the forty-fourth degree of northern Latitude, and had good evidence of De Monts' taking possession there in the year 1604. That Grant, and this possession have been before mentioned and proved. The treaty of Ryswick restored to them all the Colonies and Countries of which they had ever been possessed. This would clearly give them the Country as far west as Sagadahock or Kennebeck river at the least. That a great degree of uneasiness would take place in this event is to be taken for granted from the nature of the case. The Records of the Province do not afford us regular proof of the fact, because perhaps it was not thought

^a Et viceversa dominus Rex Magnæ Britanniae restituet domino Regi Christianissimo omnes regiones, insulas, arces et colonias ubiuis locorum sitas quas possidebant Galli ante dictam ejusdem belli declarationem, &c.

^b The Charter Deed to them.

^c See the Deed.

to be a subject for a record, or perhaps, because a great waste and destruction by war and by fire have been made in the Records of the Government. The proceedings on occasions of that nature were contained in the Instructions of the province to their Agents in London, and in the Letters of those agents to the Government for which they acted.

Very few of those Instructions and Letters are recorded or in any way preserved.^a But Governor Hutchinson, in his second volume page 111 says,

Representations were made [in October 1700] to the ministry, and the right of the English to the eastern country, as far as St Croix, was insisted upon. The Lords of Trade [he says] write thus to the Earl of Bellamont [who was then Governor of Massachusetts] "As to the boundaries, we have always insisted and shall insist upon the English right as far as the River St. Croix; but in the mean while, in relation to the encroachments of the French, and their building a church on Kennebeck river, that seems to us a very proper occasion for your Lordship's urging the general assembly of the Massachusetts-Bay to rebuild the fort at Pemaquid, which they ought to have done long ago, and thereby they might have prevented this and many other inconveniences."

In the proceedings of the Commissioners at Paris in 1750, vol 2^d page 336,—The English exhibit the proceedings of The Lords of Trade in these words in 1700, "The English Boundaries in those parts ought by right to extend to S^te Croix Eastward, at least there is no Colour for the French to pretend any Right Westward beyond the River S^t George."

This was a very extraordinary sentiment, as the Treaty of Breda in 1667, had restored to the French all Accadie and Nova Scotia, of which they had anciently been possessed; and under which cession they continued in quiet open possession of the Country as far West as Penobscot until the reduction of the Country by Phips in 1690.

The Treaty of Ryswick in 1697 restored to them all of which they had ever been possessed, and yet in 1700, the Lords of Trade and Plantations say, they were determined to support the right of the English to the Country as far east as S^t Croix.

It might here with propriety be observed that the French in 1750 claimed the Country as far west as to Kennebeck, and from thence to the River S^t Croix because as they said the Treaty of Utrecht which ceded to the English Nova Scotia and Accadia according to their ancient Limits, did not come farther west than St. Croix. But

^a Secretary's Certificate.

the English then contended on the mode of expression in the Treaties of Breda and Utrecht. That the whole Country from Kennebeck to the River St Lawrence, was comprehended in the descriptive words "Accadie or Nova Scotia" and yet they had after the Treaty of Ryswick contended for a contrary construction as appears by the foregoing Letter and Extract.

Sec. 43. When the French by themselves, and their Savages, were daily making encroachments on the Province under the Treaty of Ryswick, it became necessary to do something in defence of the Country. This could not be done without the consent of the Crown; and therefore an application was proper and pertinent. The answer was "Repair and Man your Fort at Pemaquid, for, be the Treaty of Ryswick as it may, We have always insisted, and shall always insist on the English right as far as the River St Croix."

The Sovereign of the Country had no doubt a right, by treaty to cede away the whole, or any part of it, but he had a right to explain to his own subjects his own Treaty; and here the Province was, through the ordinary mode of communication, assured of the construction which the Crown had put upon the Treaty of Ryswick. And here, under national considerations, they were obliged to consider their eastern Boundary as being at the St Croix. Why the St Croix was then mentioned, and what was intended by it, will be considered hereafter.

Vote to rebuild
the Fort at
Pemaquid

Sec. 44. Upon this encouragement, the General Assembly in 1702, voted to build the Fort at Pemaquid. Their Vote was in the words following, as taken from the records, a copy of which properly authenticated, is on the Table.

March 27, 1703. The Vote of the Council passed the tenth current, for accepting the Report of the Committee for erecting a Fortification at or near Pemaquid, sent down to the Representatives for Concurrence [w]as brought up again, &c.

Sec. 45. By this Vote it appears, That the Province considered itself as unable to man a Garrison on the Eastern Frontier. Governor Hutchinson observes that there were several petitions from the Province in which its inability to maintain Garrisons in Accadie might be probably construed as a Relinquishment of the Country; but there are none to be found on the Records of the Province excepting the one recited already.

Principles of
the vote

Sec. 46. By the Treaty of Ryswick the Province considered

all the Country east of Kennebeck as gone, but their hopes were revived by a construction given to that Treaty by the Court at Whitehall; And had their disposition to claim as far as Canada River been ever so strong yet their hands were too weak to support their Claim even if their Sovereign would have untied them for that purpose.

The province
obliged to be
content with the
King's determi-
nation

Sec. 47. In the year 1731, there was a question referred to the Attorney and Solicitor-General, by the Ministry, on the subject of this Country, which we are to attend to presently. These Law Officers, in their very lengthy report, mention that Governor Dudley, in the years 1702 and 1703, 1704, and 1705, had by Her Majesty's orders, pressed the House of Representatives, to rebuild the Fort at Pemaquid. The Proceedings of 1702 upon that subject are recorded in these words, viz.,

Report of Yorke
& Talbot

MONDAY, NOVEMBER 16. 1702

Present in Council—His Excellency Joseph Dudley, Esqr., Governor, the Honorable Thomas Povey, Esqr., Lieutenant Governor &c.

His Excellency sent a message to the Representatives, desiring Mr Speaker and the House forthwith to attend him in the Council-Chamber; and being come up, His Excellency acquainted them—That he had but two things of moment to communicate to them at the opening of this Assembly. The one—that of Her Majesty's Command for the building of a Fort at Pemaquid, and the other that of providing for the support of the Government; neither of which they had brought to any effect, and acquainted them that he had received Letters from Whitehall, by the Ship now arrived, and ordered the Secretary to read a Letter from The Right Honorable The Lords Commissioners for Trade and Plantations, of the 15th of September past containing a direction to his Excellency in observance of Her Majesty's express orders—To move the Council and Assembly to erect a Fortification at Pemaquid, &c., according to the projection of Colonel Romer Her Majesty's Engineer. And the said Letter being accordingly read by the Secretary and afterwards enforced by His Excellency, His Excellency dismissed the Representatives to return to their Room. Then His Excellency directed that the report of the Committee appointed to consider of that clause in His Excellency's speech, which refers to the erecting a Fortification at or near Pemaquid, be again read at the Board; which was done accordingly, and is in the words following, viz.,

Act to build the
Fort at Pema-
quid

CAMBRIDGE, October 21. 1702.

Having considered the present State of the late fort at Pemaquid, which was in the last Session of the General Assembly recommended

to us by the Governor, by Her Majesty's special Command upon which we attended His Excellency to the place. We are humbly of opinion that the stones being already in the Place, the Ground already trenched, and the Foundation probably still good, and Lime to be had near and easy, the General-Assembly may, in obedience to her Majesty's Pleasure and direction therein, agree and order that there be a sum of money granted to be paid in two years, for the raising of the walls of said Fort. And that Her Majesty be humbly addressed to put a Garrison of One hundred Men under proper Officers, to secure the same for the future.

The charge of its maintenance being so very great and the other frontiers of the province being so far extended, that puts the province to almost an insupportable Charge in time of War with the French and Indians.

JOHN HATHORNE,
DANIEL PEIRCE,
JOHN APPLETON,
JON GOREHAM,
EDWARD BRATTLE.

After reading of which Report, His Excellency put the Question to the Board, Whether they accepted the said Report of the Committee? And it passed in the affirmative. And the said Report was thereupon again sent down to the Representatives with the said Vote of the Board for accepting the same, by Nathaniel Byfield Esq^{re}.¹

Claim not continued beyond
St Croix after the
treaty of Utrecht

Sec. 48. Under these Circumstances, the Country remained until the Capture of Port-Royal, and the Treaty of Utrecht, which Restored all Accadie and Nova Scotia permanently to the Crown of Great

Britain.

We do not find that the Province upon recovery of the Country in 1712 claimed the whole of it as theirs *jure postliminii*, but were contented with their claim as far as St Croix which they had been flattered with after the Treaty of Ryswick.

Sec. 49. But the Crown whilst it urged the Province to erect and maintain a Garrison of defence at Pemaquid by assurances that the

Proceedings the same as if the
Charter had its
former extent

Nation would *insist* upon their claim as far east as St Croix did not say that it should be insisted upon [for] the use and benefit of the province. And yet every-

thing went on in the same way as to formal proceedings as if the province was still extended to the River and Gulph of St

¹ This text of the proceedings of 1702 substantially agrees with the text found in Goodell, Acts and Resolves . . . of the Province of the Massachusetts Bay. Boston, 1892, vol. 7, pp. 739-40, except that the opening and the concluding paragraphs are here summarized.—EDITOR.

Lawrence. The explanatory Charter of George the First to the Province was issued in 1726 and he there describes the province as made up of the old Massachusetts, Plymouth, The Province of Maine and "The Territory called Accada or Nova Scotia and all that tract of land lying between the said Territorys of Nova-Scotia, and the said Province of Main." The Commissions to Governors Shute, Burnet, Shirley, and Bernard from the year 1720, to 1762 were in the same stile and had the same description of the Province.

Sec. 50. And yet, in the year 1718, there was an attempt to take all the land east of the River Kennebeck.—Governor Hutchinson gives an Account in his history Vol. 2, page 203 [3rd ed.; p. 225, 2nd edit.] of a petition of

Petition of Arm-
strong in 1718

William Armstrong and others who had been Officers and soldiers in the army, "praying for a Grant of the Lands, between Nova-Scotia and the province of Maine, the said tract of land [as they said in their petition] having been conquered by the French in 1696 and possessed by them until 1710, when it was recovered by the English and, by the Treaty of Utrecht, was with Nova-Scotia given up by France to the British Crown."

On this question M^r Dummer who was Agent for the province was heard several times before the Lords of Trade. They proposed to him that if he would resign the jurisdiction between the rivers Kennebeck and Penobscot the Crown would confirm to the Province the property of the soil. Upon that proposal being communicated to the General Court, they gave him orders to "make no concessions." This was a project to make a new Government between Kennebeck and Nova Scotia. Though the English Court had determined to assert their right to the territory, as far as S^t Croix, before the treaty of Utrecht, and the Province was led to believe that their territory and jurisdiction was to be supported in that extent, yet as soon as the Crown had the quiet possession of the Country by the Treaty of 1713, there was an attempt to restrain the province to the limits of the Province of Maine.

Proposal of Ces-
sion by the Lords
of Trade

Attempt of
restriction

Sec. 51. Another attempt was made in 1731, for the same purpose. The petition of Habijah Savage, and others, gives the history of that attempt being made by David Dunbar under the Authority of the Crown. This petition (a Copy whereof is on the table) and the report of *Yorke* and *Talbot* the Attorney and Solicitor-General annexed to it and properly authenticated, supports a great variety of historical facts which the Agent for the United States has had the honour to Suggest.

Dunbar's attempt

The Report was thus given:¹

And we certify your Lordships That we have been attended to by Mr Paxton Solicitor for the affairs of His Majesty's Treasury and by the respective Agents of the province of the Massachusetts Bay in New England and of the Petitioners and have heard Council on behalf of the Crown and of all the said parties; at which hearing were laid before us a Copy of the Charter granted by their late Majesties King William and Queen Mary, on the 7th day of October in the third year of their reign, to the Inhabitants of the said province of the Massachusetts Bay, and the several affidavits hereunto annexed, together with copies of divers conveyances of particular parcels of Land, lying within the tract in Question, which were certified under the seal of the said province.

Upon considering the said case and questions and the evidence laid before us and what was alleged on all sides it appears to us, That all the said tract of Land, lying between the rivers of Kennebeck and St Croix, is (among other things) granted by the said Charter to the inhabitants of the said province; and that thereby power is given to the Governor and General Assembly of the said province to make Grants of Lands within the said limits, subject to a proviso that no such Grants should be of any force until their said late Majesties, their heirs or successors, should have signified their approbation of the same.

It appears also by the said Charter that the rights of Government granted to the said province, extend over this tract of Land. It doth not appear to us that the inhabitants of the said province have been guilty of any such neglect or refusal to defend this part of the Country, as can create a forfeiture of that subordinate right of Government of the same, or of such property in the soil, as was granted to them by the said Charter; it being sworn by several of

¹ Verbal accuracy in the quoted passage here given has been assured by the comparison and correction of the text in connection with the original print in the possession of the Harvard College Library. The greater part of the passage is given by Gallatin and Preble in an extract printed in Appendix No. XVI of their First Statement in the Northeastern Boundary Arbitration before the King of the Netherlands, under the Convention of Sept. 29, 1827. The passage here given is preceded by an introductory statement, also given in Gallatin and Preble, of the questions submitted, as follows:

"Upon this State of the Case the Questions proposed to us were,

"1. Whether the inhabitants of the Massachusetts-Bay (If they ever had any right to the government of the said Tract of Land lying between St. Croix and Kennebeck, or Sagadahock,) have not, by their neglect, and even refusal to defend, take care of and improve the same, forfeited their said right to the Government, and what right they had under the Charter, and now have, to the Lands?

"2. Whether by the said Tract being conquered by the French, and afterwards reconquered by General Nicholson in the late Queen's time, and yielded up by France to Great Britain by the Treaty of Utrecht, that part of the Charter relating thereto became vacated? And whether the Government of that Tract and the Lands thereof, are not absolutely revested in the Crown, and whether the Crown has not thereby a sufficient power to appoint Governors, and assign Lands to such Families as shall be desirous to settle there?"—
EDITOR.

the said affidavits that a Fort was erected there, and for some time defended, at the charge of the Province, and that Magistrates and Courts of Justice have been appointed within this district; and that one of the Council of the province hath always been chosen for this division.

And tho' it is certain that this part of the province hath not been improved equally with other parts thereof, yet, considering the vast extent of Country granted by this Charter, and the great improvements made in several parts of it, we conceive that will not create a forfeiture, because in such a case it is not to be expected that the whole should be cultivated and improved to the same advantage; and whether there hath been such a neglect or non-use of any part as may amount to a forfeiture, must be adjudged of not upon the particular circumstances attending that part only, but upon the circumstances of the whole.

And if the province had incurred any forfeiture in the present case, no advantage could be taken thereof but by a legal proceeding by Scire facias to repeal their Charter, or by inquisition finding such forfeiture.

As to the question stated in the case, upon the effect of the conquest of this tract of Country by the French, and the re-conquest thereof by General Nicholson, we conceive, that the said tract not having been yielded by the Crown of England to France by any treaty, the Conquest thereof by the French created (according to the Law of Nations) only a suspension of the property of the former owners and not an extinguishment of it. And that upon the re-conquest of it by General Nicholson, all the ancient rights, both of the province and of private persons, subjects of the Crown of Great Britain, did revive and were restored *jure postliminii*. This rule holds the more strongly in the present Case, in regard it appears by the affidavits that the province joined their forces to those which came thither under the Command of General Nicholson in this service.

For these reasons, we are of opinion that the said Charter still remains in force, and that the Crown hath not power to appoint a particular Governor over this part of the province, or to assign lands to persons desirous to settle there. Nor can the province grant these Lands to private proprietors without the approbation of the Crown, according to the Charter.

As to the Case of the petitioners in the two petitions referred to us, who insist upon particular titles in themselves to certain parcels of Land lying within the district in question, we have examined into their Claims, and find by the above mentioned copies of deeds and writings, produced by them, that several of the Petitioners, and those under whom they claim, have had conveyances made to them of several of the said parcels of Land from the Council at Plimouth which was constituted by Charter in the reign of King James the first, and whose grants are confirmed by the Charter of King William and Queen Mary; and others from Indians pretending to be owners thereof; under which Grants, large sums of money appear

by the said Affidavits to have been laid out in endeavouring to settle and improve the lands therein comprized; several of which sums were expended not many years ago, particularly a Sum of two thousand pounds by Sr Bibye Lake in the year 1714, and other sums of money by others of the petitioners, in the years 1719 and 1720. And, though these settlements and improvements have been in a great measure interrupted and defeated by frequent wars, and incursions of the Indians, yet several of the petitioners, or their tenants, appear to be still in possession of some parts of the said tract of land.

Some objections were made before us to the nature of the Grants and conveyances under which the petitioners claimed and to the manner of deducing down their titles, but we conceive that in Questions of this kind concerning rights to Lands in the West Indies, and upon enquiries of this nature, the same regularity and exactness is not to be expected as in private suits concerning titles to Lands in England, but that in these cases the principal regard ought to be had to the possession and the expences the parties have been at, in endeavouring to settle and cultivate such Lands.

Therefore, upon the whole matter, we are of opinion that the petitioners, their Tenants or Agents, ought not to be disturbed in their possession, or interrupted in carrying on the said settlements in the Lands granted to them within the District in Question.

All which, &c.

P. YORKE.
C. TALBOT.

Aug. 11th, 1731.

There was here no Question submitted as to any other territory than that between Kennebeck and S^t Croix, because that after the Treaty of Ryswick, though the province had not by any formal Act, relinquished its claim to the Country as far as the S^t Lawrence yet it ceased to contend for it. This statement is given by the province in the words following at that time in a letter to their Agent.

This whole province of Nova Scotia is expressly included within the Charter to this Province. The great difficulty of defending a Country, so remote from our Center made it a lesser hardship than otherwise it would have been for the Crown to take it from us after the peace of Utrecht, and to Settle a distinct Government there. But for the Country between the Rivers Kennebeck and S^t Croix, we have been at continual expence in defending it, never imagining our right of jurisdiction, and our right of granting the property, conditionally, would ever be disputed. And yet as soon as that Country is freed from the danger of enemies, our title both to jurisdiction and property, as to great part of that Country is questioned, and all our Grants made in order to forward the Settlement of it, disapproved.

This is a true state of our Case.

Notwithstanding all these discouragements, We are bound in

faithfulness to our trust to go on as long as there shall be any room left for it, defending our cause and preventing if possible this Province which formerly was one of the first, from being made the last in rank and importance of any of his Majesty's Colonies. We do not know what evidence can be transmitted in defence of the lines which still remain controverted, further than what you are already possessed of. The printed States [*sic*: probably error for Statements] of our title as it respects New York, Connecticut and Nova-Scotia, we think cannot be answered. The documents to support our allegations, have been sent properly authenticated except those historical facts, which from the nature of them can be no otherwise evidenced, than by the general credit they have obtained among mankind of all nations. In general; if any new difficulties be started as to either of the Governments, which you are not able to remove, we desire you to move for time to communicate them to us; we do not doubt we shall be able to give further satisfaction.

For the Territory east of Kennebeck we suppose Lord Stirling's Claim is over, as we hear nothing lately said about it and indeed it never had the least foundation. Nor can we well conceive what exception can be taken to our title under the limitations in the Charter.

We know that none of our Grants will be of any validity without the Royal Confirmation. Our principal view in making Grants of the Townships was the cultivating and improving His Majesty's Dominions, which otherwise must remain a Wilderness, and can be in no respect beneficial to the nation. We should be glad to be informed whether the exception be to our right to originate any grants; or whether it be to the particular grants, either as to the persons to whom the Townships were granted, the condition of the grants—or to any other matter, either in point of form or substance.

If there be any prospect of the Grant's obtaining His Majesty's Confirmation, we doubt not the General Court will do everything proper on their part, in order to promote the settlement of so considerable a part of the province. By a proper application for that purpose you will no doubt be able to satisfy yourself and us upon these points.¹

Sec. 52. This controversy was laid aside, and Dunbar was ordered to retire and peace at home was preserved by continued wars abroad, until after the reduction of Canada by the English when the peace was concluded in 1763. In the year 1764 a number of Townships lying east of Penobscot, were granted by the General Court as appears by attested copy of the Grants, now before the Board. These have never been confirmed by the King.

Controversy
silenced by the
war

Townships
granted east of
Penobscot

¹ This extract from the letter to Jasper Mauduit, dated Nov. 27, 1764, substantially corresponds with the text given in the Baxter MSS., Coll. Me. Hist. Soc., 2nd Ser., Vol. XIII, pp. 395-6.—EDITOR.

A Letter written by Mr. Mauduit, Agent of the province, as attested from the Council records, shows the idea which the Ministry then had upon the subject. The Letter is here given at full length, and an attested copy is on the Table—

LONDON, 9th June 1764.

SIR, It is with pleasure that I now write to inform the General Court that their several Grants of Lands to the east of Penobscot are in a fair way of being confirmed.

Mr Jackson and I have sought all opportunities of bringing this business forward; but the Board of Trade has been so much engaged that they could not before attend to it. In the course of the affair the chief things insisted on were: that the Lords, notwithstanding the opinion formerly given, are still disposed to think the right of the province doubtful as to Lands between Penobscot and S^t Croix, because the Case was mis-stated to the Attorney and Solicitor General, and that, whatever be the determination on this head, yet the Lords think that the Province can claim no right to the Lands on the River S^t Lawrence, because the bounds of the Charter are from Nova Scotia to the river Sagadahock; so that this right cannot extend above the head of that river. That however if the province will pass an Act empowering their Agent to cede to the Crown all pretence of right or title they may claim under their Charter to the Lands on the river S^t Lawrence, destined by the Royal Proclamation to form part of the Government of Quebec, the Crown will then wave [*sic*] all further dispute concerning the Lands as far as S^t Croix, and from the sea coast of the Bay of Fundy to the bounds of the province of Quebec; reserving only to itself the right of approbation as before. Mr Jackson and I were both of us of opinion that the narrow tract of Land which lies beyond the sources of all your rivers, and is watered by those which run into the river of S^t Lawrence, could not be an object of any great consequence to you, though it is absolutely necessary to the Crown to preserve the continuity of the Government of Quebec, and that therefore it could not be for your interest to have the confirmation of those Grants retarded upon that account. It was therefore previously agreed between us, and accordingly upon my next attendance at the Board, when Lord Hillsborough asked me if I had any authority from the province relative to the Lands upon the south of the river S^t Lawrence, I answered that I had no Instructions relative to that particular part, but that as I was very desirous of having the provinces Grants confirmed, I was ready to engage myself thus far for the Province: That if the Grants might be confirmed, such confirmation should not be pleaded in prejudice of the King's rights to the Country contiguous to the river S^t Lawrence, which by the Royal Proclamation, makes a part of the Canadian Government. I hope that the General Court will not think that I have herein departed from or mistaken their

Interest. It appeared to me, that though the Duke of York's original patent extended to the River of Canada northward, yet that that was mentioned rather to preserve the national claim, than as intended by the Crown to be of Force against itself; that a country which lies so remote, and whose rivers run still farther from you into that of S^t Lawrence, could neither be settled nor retained by you; that the obtaining a confirmation of the Lands you claim, upon a consideration given, renders the Crown's acknowledgement of your title so much the more solemn and irrevocable, and that the province hereby gained a merit with the Crown at no real expense of its own. In this whole affair, M^r Jackson and I have acted in concert; but as the Grants were sent to him, he will write to you more particularly upon the Subject.

I am with the highest respect, Sir,

Your most obedient Humble Servant

JASPER MAUDUIT.

To the Great & General Court.¹

Sec. 53. Another Grant was made in 1762 to Governor Bernard, of the Island of Mount Desert. This was confirmed by the Crown. But the Lords of Trade in the Letter to Governor Bernard keep up the idea of the whole of the Province east of that part which had been the province of Maine, being taken off by the Treaty of Ryswick, as connected with and explained by the treaty of Breda. Their Lordship's Letter is in the following Words:

Lords of Trade
Opinion in 1764
on Gov^r. Ber-
nard's Grant

WHITEHALL, *March 11th 1763.*

SIR: We have taken into our consideration your Letter to our Secretary dated the first of December, and the several papers which you have addressed to the Board relative to the Grant of the Island of Mount Desart, which the General Court of Massachusetts is represented to have made to you in July 1762.

Letter from the
Lords of Trade to
Gov. Bernard

We can have no objection to your acceptance of this Grant as a testimony of the approbation and favor of that Province in whose service, and in the conduct of whose affairs, you have manifested so much zeal and capacity, nor should we have delayed our representation upon it to the Crown if the Deed itself had been before us. You are sensible there are some circumstances peculiar to the Situation of this tract of Country which make it necessary to consider both the Case itself, and the manner of carrying such a grant into execution. When we shall be actually in possession of the Grant, we will bring the matter to issue with all possible dispatch, and endeavor to decide whatever questions arise upon it, in a manner which shall be agreeable and upon grounds which shall be just to all parties concerned.

¹ Verified by officially authenticated text in App. xx, Gallatin and Preble, *Northeastern Boundary*, 172.—EDITOR.

It may be proper to observe to you that the doubt conceived upon the claim of the Province of Massachusetts is not found[ed] upon the allegation that the Lands to the east of Penobscot were not in the possession of the Crown at the time of granting the Charter, but upon the operation which the Treaties of Ryswick & Breda (by which Treaties this tract of country was ceded to France) should be admitted to have had upon the Charter itself.

We cannot take upon us at present to say how far all future consideration of this question is precluded by the order of Council grounded upon the opinion of the Attorney and Solicitor General in 1731. This is a delicate point, which should be reserved till the deed shall come regularly before us, and in the meantime we cannot think it expedient to advise any conditional Grant whatever of this Island.

We are your most obedient Humble Servants,

C. TOWNSHEND
SOAME JENYNS
ED: BACON
ORWELL

FRANCIS BERNARD, Esq.

*Governor of the Massachusetts Bay.*¹

Sec. 55.² These sentiments of the Lords of Trade, connected with the Ideas of their long established influence in plantation concerns, could not fail to render the Lands between Kennebeck and Saint Croix an object of Speculation. By the foregoing correspondence between Bernard and the Lords of Trade, and perhaps by other apt and persevering communications, which must of course be kept secret from the Province, he and his friends and associates well understood the plan of the Ministry in regard to the Territory.

Intentions of
Bernard

There was a well known intention at that time of making a new province, but there were not people enough eastward of Kennebeck for that purpose, without rendering the Government a burden to the Crown; and whilst the people of the Province of Maine were divided in their opinion of uniting in the new province, the Government of Massachusetts was determined against having anything of the kind effected.

Idea of a new
province in 1764

Sec. 56. Governor Bernard was placed where his influence was courted on each side. He had obtained a Grant of the Island of Mount Desert which was all he expected from Massachusetts. This Grant was confirmed by the Crown; he therefore sought for his advantage on

Grant from Nova-
Scotia to Bernard

¹ Verified by officially authenticated text in App. XIX, Gallatin and Preble, *Northeastern Boundary*, 170.—EDITOR.

² There is no Sec. 54.

the other side, and in the year 1765 obtained a Grant from the Governor of Nova Scotia for One hundred thousand acres, within the Territory then in question but not within what is now claimed by the British Government. This tract is on the seashore, and on the west side of Passamaquady Bay. The evidence of this Grant is before the Board.

Sec. 57. By the Governor of Massachusetts receiving that Grant, much was, no doubt, supposed to be effected in support of the position of the Ministry,—that by the Treaty of Ryswick all the Country east of Sagadahock was lost to Massachusetts, but that the part on the west of Saint Croix and extending to Sagadahock was saved to the Crown.

Sec. 58. But Still the Question remains to be more particularly answered; If the Grant made by King James to Sir William Alexander, was rendered void in the year 1732 and the Country as far as the Gulph and River Saint Lawrence, was Granted to the Province of Massachusetts Bay by William & Mary, and no line of restriction as to boundary has ever been made, why should a place called Saint Croix or The River Saint Croix, be adverted to by the Ministry and the province as a line of division? And why should the Commissioners at Paris in 1782, be led to fix on the River Saint Croix, as a National Boundary?

Operation of that Grant
Question Why St Croix was considered as a Boundary

Sec. 59. To this Question The Agent for the United States will answer—

First. By examining what the meaning or intention of Saint Croix as used by the parties, is.—And

Answer

Secondly. By shewing that other circumstances than those of the patent to Sir William Alexander produced the idea of St Croix being a Boundary.

Sec. 60. The translation of the words Saint Croix, is unnecessary; because the only Question before us arises on its figurative or relative meaning. We find, very frequently, the Rivers take their names from the appropriate name of the place, the Shores of which they lave; and sometimes, that places derive their names from the Rivers which pass through them. Instances of this kind are so frequent that it would be a misspense of time to detail them. The Board will be pleased to refer themselves to the circumstances of the River Connecticut from whence all the settlements on the shores of that stream have taken a general name. The names of the Rivers Merrimack, Piscataqua, Kennebeck & Penobscot. The Delaware and the Hudson have had a similar

Name of St Croix

effect, and the River Saint Johns which is under our eye in this cause, will be recollected.

Sec. 61. There is no doubt but that a certain Bay or River somewhere connected with the Bay of Fundy, derived its name from a St Croix the name circumstance of a wooden cross being erected upon of a place as well it by a French adventurer in the year 1604, or from as of a River some other circumstance which may become proper for consideration hereafter, and was thus called The Saint Croix River or Bay. And it is also certain, that a settlement which took place near it, soon afterwards was called by its name. There was no propriety in giving it any other name; and hence the transactions connected with the Country there, mention it sometimes as a River, and sometimes as a place or settlement.

Sec. 62. De Monts originated the name of Saint Croix, as descriptive of a Water or Territory, in the year 1604. The account of this transaction we have from L'Escarbot, who visited the Country first in the year 1606, and published his history in 1609. The account he gives is, as translated in Churchill's Collection of Voyages,

Description of
St Croix by
L'Escarbot

They came following the Coast, twenty leagues from that place [St. John's river], to a great river, which is properly sea, where they fortified themselves in a little island seated in the midst of this river, which the said Champdore had been to discover and view; and seeing it strong by nature, and of easy defence and keeping . . . they resolved to make their abode there. . . . The isle of the Frenchmen's retreat was called St. Croix, twenty five leagues distant from Port Royal.

And again,

As for the nature of the ground it is most excellent and most abundantly fruitful; for the said Mons. de Monts having caused there some piece of ground to be tilled, and the same sowed with rye, . . . he was not able to tarry for the maturity thereof to reap it; and notwithstanding, the grain, fallen, hath grown and increased so wonderfully that two years after we reaped and did gather of it.^a

The Agent for the United States does not in this stage of the cause, go into a full discussion of L'Escarbot's history of De Monts'

The Agent of the
U. S. reserves
other remarks
upon that author

Voyages to Accadie, but reserves his observations until he shall reply to those of the Agent for His Britannic Majesty, when he shall be pleased to exhibit "The Ancient Authors Voyagers and au-

thentic documents"¹ which he has been pleased to mention as ready in support of the claim he has preferred.

^a Churchill's Voyages, 8, pp. 802, 803, 805.

¹ The copy here appears to be inaccurate, as the phrase is not found in this precise form in Mr. Chipman's Statement.—EDITOR.

Sec. 63. But here it may be proper to observe, that from L'Escarbot's description the Island must have been large enough to have given a denomination to the adjacent Country. This Account of L'Escarbot's may or may not be correct. The circumstances of name happened two years before he came to America. De Monts at that time, had fallen into disgrace in the Court of France, and L'Escarbot was more immediately attached to Mons^r De Poutrincourt.^a He might therefore be left to this conjecture in regard to the origin of the name of the place where De Monts had landed; or he might have taken it from the vague and uncertain reports of sailors and voyagers, who were pursuing marvellous things in an age of darkness, superstition and credulity.

Origin of the
name uncertain
as to the Island
spoken of by
L'Escarbot

Sec. 64. In the Memoirs of the proceedings of the English and French Commissioners in 1750, Vol^e. 1, page 45, The French Commissioners say that Governor Razilly had a Commission for the Bay and River S^t Croix, as Governor in the year 1632.^b No one will suppose that he had a Commission over the Water or River only; but every one will conceive that by the descriptive denomination of S^t Croix, the place and settlement were both intended.

Razilly's
Commission

Sec. 65. A Grant was made in 1632, by the King of France to Razilly, of the river and bay of Saint Croix, the islands contained therein, and the lands adjacent, on the one side and the other, in New France.^c There could be no other name at that time to distinguish this place from the rest of Accadie, but the name of Saint Croix as a place. The Bay or Waters as well as the River are called by that name in this Commission.

Saint-Croix the
name of a place

Sec. 66. In the year 1635 on the 7th of June the Corporation for the Government of New England, surrendered their Charter.

Hazard has this paper in his collection, Vol: 1: page 347 "Sir Ferdinando Gorges is made Governor of the whole Country. They have divided the Country in twelve Provinces. And they disposed it into the Hands of twelve Men; out of which twelve Men there is a Governor continually to be chosen." Where Hazard copied this from does not appear; but from the accuracy of that Gentleman, it may be depended upon, as an accurate authentic paper.

Surrender of the
Charter of New-
England Cor-
poration

^a L'Escarbot & Charlevoix.

^b Le Commandeur de Razilly passa néanmoins en Amérique en 1632, on lui fit la concession de la rivière & baye de Sainte-Croix en la Nouvelle France &c.

^c L'étendue des terres & pays qui ensuivent, à savoir la rivière et baie Sainte-Croix, isles y contenues, et terres adjacentes d'une part et d'autre en la Nouvelle France. Memoirs Commrs. at Paris 1750, Vol. 2, page 491.

Sec. 67. Governor Hutchinson in his first Volume, page 49, gives the copy of the Surrender of the New England corporation Charter; but it need not be transcribed here, as the only design of resorting to that fact, is to shew the use at that time of the Words Saint Croix.

Saint-Croix a
place

Hutchinson says page 50 in the same Volume, that—"The proposed divisions of the twelve provinces were as follows: The first, was from St. Croix to Pemaquid; the second, from Pemaquid to Sagadahoc."

This was soon after the conveyance of Alexander to La Tour, and the Treaty of St Germain, in which the King of England had restored to France all Accadie.

Here the River is not mentioned, but the words are—"From Saint-Croix," &c.

Duke of York's
Patent

Sec. 68. On the twelfth of March 1664, King Charles the Second granted to his brother the Duke of York:

All that part of main-land of New-England, beginning at a certain *place* called or known by the name of *St. Croix*, next adjoining to *New-Scotland* in *America*, and from thence extending along the Sea-coast, unto a certain *Place* called *Pemaquie* or *Pemequid*, and so up the River thereof, to the furtherest head of the same, as it tendeth Northward; and extending from thence, to the River *Kimbequin*, and so upwards, by the shortest Course to the River *Canada*, Northward.

Here it is to be observed: That the patent which is mentioned in Smith's History of New York, in Hutchinson and many other writers does not mention a River as a Boundary, nor refer to any former grant to Sir William Alexander or to any other person, but takes its departure from A Place called St Croix, and extends westward on the Sea Coast and northward on the shortest route to Canada.

No reference to
Alexander's
Grant

Sec. 69. One Dongan was appointed finally a Deputy Governor over this territory; but the Indian war in 1676, broke up the settlements which had been made to the eastward of Casco Bay. There are some Records of precepts and proceedings of that Government in the Secretary's office in Massachusetts; but it is said that there are more of them in New York. In the year 1671 The Government of Massachusetts attempted to determine their east boundary; and considering their patent to extend three miles north of every and any part of the River Merrimack, and to be bounded on an east and west line from thence extended to the

Government
under the Duke
of York

Massachusetts
attempt to settle
their eastern Line

Atlantick on the one part and the South Sea on the other, stretched a line by astronomical observations from three miles north of where the river issues out of the Lake Winnepesoga, and comes to the eastward of Pemaquid on the sea shore.

This was a strong assault on the Duke's Government, but the Indian war put an end to the Civil Controversy before the parties became warmly engaged in it.

Sec. 70. There was never any kind of regular government on the east of Kennebeck excepting that under the Duke of York untill the Charter of William & Mary to Massachusetts was extended over it. The Country being thus without a ^{Government there} government and liable to the French claims incessantly urged against the English, and the plan of one general Government, so long attempted, being entirely defeated, it was thought best to place the four northern New England Provinces, viz., Plymouth, Massachusetts, the Province of Maine, and the province which had been under the Duke of York, under one Colonial Government, to which it was prudent to add the whole of the Country on the Continent stretching northward then under the British Claim. When the Country was again by the Treaty of Utrecht within the Dominions of the English, and by the Charter of William and Mary a part of the Province of Massachusetts Bay, that Province extended its Government over it in 1716 by the following resolution: viz:

June 26th 1716. In Council.

Resolved. That for the more convenient administration of justice all the lands, families and settlements within this province to the eastward of the province of Maine, shall be ^{Government ex-} annexed to the County of York, and shall be part ^{tended by} of the same to all intents and purposes until this ^{Massachusetts} Court shall take further order; any Law usage or custom to the contrary Notwithstanding. Concurred by the Representatives.

Consented to by

WM. TAILER.

Sec. 71. When by the Treaty of Breda, the whole of Accadie or Nova Scotia was restored to the French King and the same again was surrendered by the Treaty of Ryswick. The British Ministry, as has before been proved, entertained ^{Idea of preserving} ideas of yet holding the Country as far east as St ^{the Country as} Croix. This they could not have done under the idea ^{part of New-} of a Grant to Sir William Alexander, for the land was never within his boundary, and that Grant had been long laid aside. But they must consider the Charter of William & Mary as preserving all the New England Territory, under the idea of including the Grant to the

Duke of York, which by its Charter was to begin at a place called S^t Croix next adjoining to New Scotland.

Sec. 72. There then, as the Agent for The United States conceives, the true idea of the Saint Croix being considered as a boundary, may be found, and that it will be idle to resort to the Grant to Sir William Alexander on the subject. The idea of New England's extending to S^t Croix is expressed in the Charter to York, and relied upon as the boundary of Massachusetts, or where the English claim is insisted upon by the Lords of Trade in October 1700.

Saint-Croix the
boundary of the
Duke of York's
Patent

The Country north of that, was no doubt the Ancient Nova Scotia. How this conclusion will affect this controversy will be more proper for consideration when we come to investigate under the third argument, Which was the River agreed upon in the Treaty of 1783 as the River S^t Croix, and perhaps more so when we come to consider what ought to be deemed the source of the River within the true intendment of the Treaty. One observation may be pertinently made in this place; that is, that if the Duke's Government was bounded east on the S^t Croix river, and to run a north line from what the English claim now states to be the source of the River, it would make a singular figure on a Map, as a Province or Government.

There was no Eastern continued Line of Boundary given by the Duke's Charter but it was bounded at a place called Saint Croix to run on the sea to Kennebeck River and to extend up that River northward, to its head, and to extend northward on the shortest course to Canada.

Sec. 73. The Agent for the United States, having thus as a preliminary in his arrangement, considered—Whether there was in the year 1783 any province called Nova Scotia holden under or by the Grant or Patent of King James to Sir William Alexander, and having shewn that the whole Country and territory eastward and northward of the Province of Maine had been granted to and been continued the property of Massachusetts, to the above date, without any restriction or limitation of its original boundary by Charter, Agreement, or legal process, he will now proceed to offer Evidence and Arguments to prove and establish that the Magaquadavie was in fact, in the Treaty of 1783, agreed upon as a part of the Boundary, by the name of The River Saint Croix.

Conclusion from
the facts stated

THIRD PART

Sec. 1. Having thus shewn that there were no circumstances in the Grant to Sir William Alexander in 1621 which could lead the

Commissioners of 1783 to fix on the Scoudiac, or upon any other river, as a Boundary, or as the river by them in the Treaty of Peace denominated the River St Croix, the Agent for the United States will proceed to exhibit evidence and arguments to prove that the river by them intended in the same Treaty, is the River by the Indian natives called the Magaquadavie.

Proposition to shew that the Magaquadavie was the river intended

Sec. 2. Previously to this discussion, it will be necessary to pay some attention to one or two propositions made by the Agent for His Britannic Majesty. He has, in his Memorial of Claim, stated:

Attention to propositions in the British Claim

That the descriptions by authors and navigators of undoubted credit and authority, of the river St Croix exactly correspond & agree with a certain river which emptieth itself into the Passamaquoddy Bay on the western side, and has for some years past been called Scoudiac by the native Indians, and extendeth itself westward near to the Penobscot.¹

The Agent for the United States can only say upon this proposition, that when the Agent for His Majesty shall produce the descriptions of which he speaks, the Agent for the United States will claim a right to acknowledge their force or to shew their insufficiency as may then appear fit and proper. He will here add, that from all the researches he has been able to make, the ancient historians, documents of State, and ancient maps are generally, if not all, against the position of the Agent for His Majesty.

Remark on the proposition of the Agent of the King of Great Britain

But were they all in favour of his averment, yet no certain conclusion could result from them, for whatever authors or voyagers might denominate the River St Croix, the Commissioners in 1782 might intend whatever River they pleased by that name, and under that name might make it a part of the Boundary between the two nations.

It ought to be observed that the Question now to be decided is not What river is anciently by authors or navigators called The St Croix, but What River was truly intended in the Treaty of Peace made in 1783 by the name of the River Saint Croix as forming a part of the Boundary therein described. And yet it is to be acknowledged that such facts and documents as the Agent of His Britannic Majesty has mentioned might be of proper use in shewing, if they have a tendency to that effect, that the Commissioners were led by them to fix on any particular river as a boundary between the two nations.

¹For exact text as given in Mr. Chipman's Memorial, see *supra*, p. 37.

Sec. 3. The Agent for His Majesty has, in support of his claim, mentioned, that by a certain Act of Parliament made in the Year 1775, it is enacted, that the river which emptieth itself into Passamaquady Bay on the western side shall be held and deemed for all purposes in that act contained, to be the Boundary between the Province of Massachusetts Bay and Nova Scotia.

The Agent for the United States is not fortunate enough at present, to comprehend the use which the Agent for His Majesty intends to make of that Act. Should he consider it as an attempt to fix and determine the bounds of the province of Massachusetts, the answer is, that the bounds being given by Charter, the Parliament had no authority to take away a part of its territory or jurisdiction. This was frequently conceded in this very case, or in this very territory, when the Crown offered to compromise for a relinquishment of the jurisdiction of the Province over the lands east of Sagadahock. The line was there, or was not there, anterior to that Act of Parliament; and the Act being at most but a declaration of one party, leaves the Boundary where it was before. Another answer to that Act, is that the Parliament passed it with an evident conviction that the Boundary was not settled, and that they had no right to settle it in that mode; for they say in the Act that the River therein described shall be held and deemed the boundary between the two Provinces for all the purposes in that Act mentioned. If the Boundary was known and fixed before, there could be no necessity of an Act of Parliament on the Subject. The executive could have directed the Officers of the Government in their mode of Conduct on the occasion. If they had a right to settle a boundary by parliamentary power where the right to the soil and the civil jurisdiction was by Charter vested in a Corporation, they might have settled it for all, and not for the special purposes of the Act.

The Act of Parliament was for restricting the Trade of the New England Colonies. It prohibited landing Goods in any of them, but upon certain conditions the goods were liable to seizure as well as the Vessels which bore them, unless those conditions were complied with. This Act therefore was a temporary direction to the Officers of the Customs in their Conduct under the Act itself, and was intended for that purpose only. It is true that the Act of Parliament suggests the idea that the River mentioned in it was commonly called The S^t Croix; but that is certainly no evidence of the truth of the fact. All the evidence which could be before the Parliament on that point, and probably a great deal more, is now before this Board.

The River mentioned in the Act is as probably the Inlet from the Sea called the Cobscook, as the Scoudiac, and there is Evidence in the Case that the Governor and Surveyor General of Nova Scotia believed that to be the fact.

Sec. 4. The Agent for His Majesty in his Memorial has, by way of recital, asserted that the River Scoudiac has been by the French and others called The S^t Croix from the year 1604, and always referred to and contemplated by that name in all histories, public documents and Acts of State both by the French and by the English. The Agent for the United States is compelled to wait for the evidence by which these averments are to be supported, and when that shall appear he will be ready to give it a due, candid and proper consideration.

Sec. 5. But as all these facts, if they could be supported by evidence, could have no other operation or effect than to raise a presumption, that the Commissioners in the year 1782 contemplated the Scoudiac as the river S^t Croix, and made it a part of the boundary described in the Treaty of Peace, the Agent for the United States will, firstly, exhibit some facts & considerations, from which it may be fairly and naturally concluded that the river Magaquadavie was by the said Commissioners intended as The River S^t Croix mentioned in the Treaty of Peace, and secondly, will offer satisfactory proof that the Magaquadavie was the River truly intended in that treaty under the name of the S^t Croix.

Sec. 6. The idea of satisfactory proof on this point, seems to lay aside the necessity of such an investigation as is suggested in the first proposition; but yet, as this is a controversy very interesting to the peace and harmony of the two powers which are parties to it, nothing ought to be said which will tend to break that peace or to disturb that harmony; nor anything left unsaid, which will promote objects so desirable in the eye of every good Citizen and every faithful Subject.

Sec. 7. There might here be mentioned a great variety of authors, Maps and Documents tending to shew that the River Magaquadavie, being a River running into the Bay, now called Passamaquody, on the north east side thereof, had, long before the Charter of William & Mary and from the earliest date of settlements by Europeans there, been called and known by the name of the river S^t Croix; and that no other River there had been known or called by that name in any map, or publick

Averments from
English & French
Maps, &c.

That the
Magaquadavie is
the true Line

Satisfactory Proof
renders the pro-
posed argument
unnecessary

Maps & Authors
are of use for a
particular end

proceedings, before the passing of the said Act of Parliament of Great Britain in the year 1775, which has already been attended to. But these are omitted for the present. And the Agent for the United States will ask leave to begin with those facts which took place more recently, and at and near the time of the date of that Charter, and at times posterior thereto.

Sec. 8. By the Second Article in the Treaty of Peace in 1783, it is agreed that the eastern Boundary of the United States shall be

Mouth of the River S^t Croix is made the beginning of a boundary to Nova Scotia from the mouth of the River S^t Croix in the Bay of Fundy to its source and thence directly north to the Highlands.

This is explained by the beginning of the Boundaries in that same article where the north west Angle of Nova Scotia is described; it is said—to wit, “That Angle which is formed by a line drawn due north from the source of the S^t Croix to the Highlands.”

If the bounds of Nova Scotia had been known from any ancient Charter, there could have been no necessity for thus giving it a Boundary. But the fact was, that no boundary had ever been known between the Provinces, excepting by an implication resulting from the dissolution of the Duke of York's Government.

Sec. 9. The Commissioners who form this Honorable Board having been on the place in controversy, having seen the Rivers claimed to, and having an accurate map of the Country before them, must have anticipated these observations, viz.,

First. That there is a Body of waters now called the Bay of Passamaquoddy which is between the Bay of Fundy and the main land northward, and which receives the two rivers which are mentioned in the Claims of the two nations.

Secondly. That this Bay extends as a Bay, several miles on a north course, above a place called The Devil's Head; and nearly eight leagues from the Bay of Fundy, as now known, and there ends in a body of waters called Oak Bay.

Thirdly. That a small navigable River whereon small Vessels may be borne, at or near highwater is extended by a flowing tide, west about seven miles, from the west side of this Bay; where it receives the fresh water issuing from Scoudiac River, at what is now called Scoudiac Falls.

Fourthly. That on the northeasterly side of the Bay, there is a

river which the native Indians in their language call The Magaquadavie, into which vessels of very large dimensions may enter & find a secure harbour at any time of tide, and on which river at or near high-water loaded vessels of a considerable size may be carried to a place at the foot of a great and remarkable Fall of fresh water, above five miles from the Bay of Passamaquody.

Magaquadavie
River

Sec. 10. Neither of these rivers can answer to the description of a River having its mouth in the Bay of Fundy, unless the waters called Passamaquody Bay are a part of the Bay of Fundy. Whether these Waters were ever known by the names of the Bay or the River Saint-Croix, and by that name distinguished from the Bay-Françoise, or the Bay of Fundy, may be considered hereafter, if the reply of His Britannic Majesty's Agent shall render it necessary.

Neither answers
the description in
the Treaty exactly

Sec. 11. In order to shew that the River to which The United States claim is The River St Croix meant and intended under that name in the Treaty, their Agent will proceed to shew that it has from the time of the Charter of William and Mary, and more especially since the Treaty of Ryswick, been noted, marked, called and claimed to as the River of that name; and that under that name, designation and mark, was agreed to, known, pointed out and fixed upon as a part of the Boundary described in the Treaty of Peace in 1782.

River noted in
the Treaty

Sec. 12. Though there has never been a Map of the interior part of the Country, or a completely accurate Chart of the Sea Coast, in the Bay of Fundy, or the Bay of Passamaquody, before the Chart of Des Barres, published in 1789, yet those inaccurate Charts, which had before been made, may serve in support of truth in this Cause. It is now seen that two Rivers, and two rivers only empty their waters into the Bay of Passamaquody, [and] that there is no chart which was made before that of Des Barres that exhibits those two Rivers with accuracy, as to the real and precise situation of their Mouths or the comparative size of them with each other, or with the Bay which is their common Receptacle.

Two Rivers only,
in the Bay

Sec. 13. The Agent for the United States will begin by exhibiting the Chart made by Cyprian Southack, very soon after the date of the Treaty of Ryswick, and published in England by Authority about the year 1720. There was in that day no man who possessed more ability for such a work, who had a greater opportunity to acquire knowledge in the business or who, for

Southack's Map

such a business, in a higher degree possessed the confidence of his Country. Southack, before the Year 1710, was Commander of a publick armed vessel. In that year he was appointed by a special order of Queen Anne, to pilot the fleet which went up the Bay of Fundy against Port Royal; his ability and Character must have stood very high in the public estimation to have so particular confidence placed in him. He was appointed by the province as a Commissioner of treaties, &c.^a and continued in publick life untill the time of his natural death, which happened in the year 1745, as appears by the probate of his will, exhibited by the Honorable John Tyng, his executor. There was no chart of Nova Scotia which contained a tolerable exactness before that of Southack was made. His observations are critical, and his remarks judicious; his acquaintance with the inhabitants, French and English, as well as with the Indians, & with the Names of the Bays and Rivers, was intimate and familiar.

Sec. 14. By his Chart, a copy of which, so far as it relates to this question, is herewith offered, and the original is before the Board, the

Not accurate as to the position of these rivers Bay of Passamaquody is exhibited with a competent degree of accuracy. In the Bay there appear to be

two rivers and two Rivers only, the west river of which is marked by the name of Passamaquodie and the east by the name of the Saint Croix. It is true that neither of these rivers is in his Chart placed in that situation in the bay where, on actual examination its natural situation is found to be, but, as there are but two Rivers which empty their waters into this Bay, as rivers of any consideration, and the Eastern river on his Chart is designated as the River St Croix, we can have no hesitation in deciding what river he meant by that name. One circumstance renders it certain that Southack by the river St Croix meant the Magaquadavie and not the Scoudiac—that is, that his depths of water in the former agree with what it is there found to be at this day; and with what it is marked in Des Barres' Chart and not at all with the soundings of that part of the Passamaquody Bay which the Agent for his Majesty calls The Scoudiac.

Sec. 15. Having thus considered the Chart made by Southack, and published by Authority, the Agent for the United States will at this time notice, that in the Map published in the

Map of the Mémoires of the Commissioners at Paris in 1750 Memoirs of the proceedings of the Commissioners at Paris in 1750 there are exhibited two rivers as running into the Bay of Passamaquody, the northern, or rather eastern river of which is marked as the St Croix, and exactly

^a Hutchinson, 2 Vol. [p. 109].

agrees as to its local situation, with the river marked by Southack by that name.

There are a great number of Maps published between the year 1740 & 1763; some of which are now before the Board: And all of which designate the eastern river in that Bay as the river S^t Croix.

In a question where a line had been anciently settled by agreement of Parties, or where a practical line had been established by reputation, or by possession, an ancient terreire¹ or survey is considered as an Authority by the Laws of both nations now here in controversy. But generally in matters of national Concernment they may have in some instances less weight and influence. In the present controversy this kind of evidence must derive its weight and efficacy, if it has any, from the peculiar nature of the cause. The question here is not, What was an ancient line either of dominion or possession? But What line was agreed upon by the Commissioners in the year 1782? Where there are no papers, records, or written explanation of the question, one would be naturally led to ask the men who made the settlement,—What River they truly intended as the River Saint-Croix? For, let what River will be now or formerly called the S^t Croix, yet the river they agreed upon was truly intended by the treaty of 1782 as The Saint Croix. Now the Agent for His Majesty cannot go from this point by attempting to prove that the Commissioners agreed upon the Scoudiac as the boundary, merely by proving that it was once called by the same name as the river which the Commissioners in fact made the boundary. But should this be attempted, the Agent for the United States will find it necessary for him to meet this kind of reasoning in its own way, by shewing that the River for which the United States contend, has been from a line² long before the Act of Parliament above mentioned was made, called by the name of The Saint Croix. And he contends, that if the Scoudiac was ever before the year 1775 called or known by that name, the Agent for His Majesty ought to shew it. This mode of Argument, is not assumed with an expectation of concluding the Agent for His Majesty from proving that the River Scoudiac was in fact agreed to as the Boundary; but as the Agent for the States conceives that there is no evidence as to that fact, he offers these circumstances to lead to good and sufficient reasons for an agreement by the Commissioners of 1782, to the Magaquadavie for that purpose.

¹ So in the original, but probably should read "terrier."—EDITOR.

² It is "line" in State Department copy, but it obviously should be "time."—EDITOR.

Lines necessary to the treaty Sec. 16. When the Commissioners were called to settle the Confines of a Nation, it was necessary that they should have the lines and extent of it before their eyes. Charts and Maps are naturally resorted to on these occasions.

In all the maps which could be offered, there was none which gave the Scoudiac the name of Saint Croix excepting Jefferys' map published in 1779, and in which he calls it Passamaquodie or The Little St. Croix. From what authority those rivers were thus marked, the Agent for His Majesty will shew.

Jefferys' map There is now a Map or Chart of Des Barres published in 1789, six years after the treaty of peace, where the Scoudiac is marked with a degree of parade and exultation as The S^t Croix, and the other River which had always borne that name is but barely noticed without any name to it. Every one will at once see that this was done to serve a particular purpose and to promote an interested design.

Des Barres' map Before this map was published the Act of Parliament of 1775 had been passed. The treaty of peace had fixed upon the St. Croix as a boundary. Some part of the Country between The Scoudiac and the Magaquadavie was taken possession of by subjects of His Britannic Majesty and this controversy had been originated.

The Lakes or Ponds of the Scoudiac had been surveyed, or rather a map of them made by John Jones. As that map did not exist when the Treaty of Peace was made, it could have no influence with the men who composed it.

Mitchell's map Sec. 17. There was one Map existing in 1782, which gave a competent and more particular expression of the whole of what had before been the territorial dominions of His Britannic Majesty in North America. Doct^r Mitchell's Map was published about the year 1747, and gave the appearance of the Country with a sufficient certainty for the Commissioners to rely upon him. There is in that Map, and in all others that have been published for the eastern part of Massachusetts, a failure, which gives to all the appearance of incorrectness.

The scale on which the Country there is represented, is so very small, that a River cannot be laid down, with the appearance of a River, where it ought to be placed, and covering no greater space on the plan than it ought to cover, from the comparison of its real bigness with that of the Country where it is or the Bay or Waters with which it is connected.

Mitchell's Map, Like all others, exhibits two Rivers as emptying themselves into the Bay of Passamaquody: and like them, gives the name of Saint Croix, to the most Eastern River.

That Map was before the Commissioners at Paris in the year 1782. From that they took their ideas of the Country, and upon that, they marked the dividing line between the two nations.

The annexed is a Copy of that Map so far as relates to the matter in controversy. By the Line marked upon it the intention of the Commissioners is well explained.

First. That the River intended by the name of the Saint Croix, in the Treaty, was the eastern River which empties its Waters into the Bay of Passamaquody. And

Secondly. That it was then contemplated that the line should be on a Course nearly north from the Bay of Fundy.

To this fact Witnessess will be presently called, and their Testimony will be conclusive. Whether the Map on the Table is the same that was before the Commissioners at Paris in 1782 or not, cannot from the evidence in the case be precisely ascertained at this place, (Providence). It has been a Document in the archives of The United States and transmitted to their Agent by their Secretary with this notification,

By some documents which I shall send you next week you will see that the American & British Commissioners who negotiated the Treaty of peace at Paris used Mitchell's Map of North America. This will be considered as an important Document. I shall send you the Map, in which you will see traced our whole Boundary line. Whether it is the identical Map used at Paris I am not informed. You will please to preserve it that it may be returned to this office when your Agency shall be accomplished.

Perhaps M^r Adams or M^r Jay could not declare as witnesses that the map here produced is the copy had before the Commissioners at Paris in 1782, nor can it be important to prove that fact. All the lines marked are accurate, and there is but one river called the S^t Croix and it is proved by the testimonies of Mr. Adams & Mr. Jay that the River on that Map called Saint Croix was in fact agreed upon as a Boundary.

The Testimony of the President of the United States who was one of the Ministers who formed and agreed to the Treaty of Peace is very full on this point.

It is necessary to give the Interrogatories submitted to him, and his answers to them in full length in this place.

Interrogatories by the Agent for the United States, viz:

1. What Plan or Plans, Map or Maps, were before the Commissioners, who formed the Treaty of Peace in 1783 between His Britannic Majesty, and the United States of America?

The President's
testimony

Answer. Mitchell's Map was the only map or plan which was used by the Commissioners at their Publick conferences, though other maps were occasionally consulted by the American Commissioners at their Lodgings.

2. Whether any lines were marked at that time as designating the Boundaries of the United States upon any, or upon what Map?

Answer. Lines were marked at that time as designating the Boundaries of the United States upon Mitchell's Map.

3. What Rivers were claimed to, or talked of, by the Commissioners on either side, as a proposed Boundary, and for what reason?

Answer. The British Commissioners first claimed to Piscataqua River, then to Kennebeck, then to Penobscot, and at length to Saint Croix, as marked on Mitchell's Map. One of the American Ministers at first proposed the River St. John's, as marked on Mitchell's Map, but his colleagues, observing that, as Saint Croix was the River mentioned in the Charter of Massachusetts Bay, they could not justify insisting on Saint John's as an Ultimatum he agreed with them to adhere to the Charter of Massachusetts Bay.

4. Whether a Copy of the Patent of King James to Sir William Alexander, or any Act of Parliament of Great Britain, were before the said Commissioners at that time, or spoken of, or relied upon by the Commissioners on the part of His Britannic Majesty?

Answer. It is very probable that the patent of King James to Sir William Alexander, and that an Act or Acts of Parliament might be produced and argued on, but I do not recollect, at this time, any particular use that was made of them. Nothing was ultimately relied on, which interfered with the Charter of Massachusetts Bay.

5. Generally, What Plans, Documents, and papers were before the said Commissioners, when the second Article of the same treaty of peace was formed?

Answer. No other plan than Mitchell's Map that I recollect. Documents from the publick Offices in England were brought over and laid before us, in answer to which we produced the Memorials of Governor Shirley and Mr —, and the Counter Memorials of the French Commissioners at Paris, in a printed quarto volume, a Report of Mr. Hutchinson to the General Court printed in a Journal of the House of Representatives, not many years from 1760, though I cannot now recollect the precise year, and certain proceedings of Governors Pownall and Bernard, recorded also in the Journals of the House of Representatives, and the Charter of Massachusetts Bay.

6. What were the lines claimed on each side and how was the matter ultimately settled?

Answer. Answered in part under the third question. The Ultimate agreement was to adhere to the Charter of Massachusetts

Bay, and Saint Croix River mentioned in it, which was supposed to be delineated on Mitchell's Map.

7. Whether it was agreed to let the matter of Boundary between the State of Massachusetts and the province of Nova Scotia remain as the same had been conceived to be?

Answer. Answered under the third and 6th Questions.

Interrogatory by the Commissioners

In explanation of your answer to the third Interrogatory proposed by the Agent on the part of the United States, do you know whether it was understood, intended or agreed between the British and American Commissioners, that the River Saint Croix as marked on Mitchell's Map, should so be the Boundary as to preclude all enquiry respecting any error or mistake in the said Map, in designating the river Saint Croix? Or was there any, and if so, what understanding, intent or agreement between the Commissioners relative to the case of Error or Mistake in this respect, in the said Map?

Answer. The case of such supposed Error or Mistake was not suggested, consequently, there was no understanding, intent or agreement expressed respecting it.¹

A True Copy.

ED WINSLOW
Secretary.

Here the Commissioners will observe that the River designated on this Map as the River Saint Croix, and marked as a Boundary, is the eastern river on the Bay of Passamaquoddy [and] that the grand passage, or what we call the eastern entrance into the Bay is clearly and plainly marked in it. The Islands laid down on the Map show beyond room for controversy, that two rivers near the head of the Bay, are intended to be represented. Neither of these can be supposed to be the Cobscook, for they are both placed to the Northward of Islands which are in the Bay, above the mouth of that river; and are in their form and courses different from it.

If the River marked on the Map was intended for the Scoudiac, there is no place appearing as the point of Land called Saint Andrews, but upon the idea that the River marked on the Boundary is a River on the east side of the Scoudiac there is a place for Saint Andrews and a tolerably good representation of the Waters called Oak Bay.

Besides this, it appears from the Testimony of M^r Adams and M^r Jay, that the English Ministers were at that time very far from fixing upon the Scoudiac as the Eastern Boundary of Massachusetts. The old idea of the River Penobscot being the Boundary and the True

¹ This text substantially agrees with the text heretofore given, *supra*, 63-4. The variations are slight.—EDITOR.

River Saint Croix was pursued by them, whilst on the other hand, the American Ministers insisted that the river Saint John's was the True River, there being no certainty from the evidence and documents which were before them, excepting from the Map produced by the English Ministers themselves, as appears from Mr Jay's testimony, called * Mitchell's Map of the English Dominions in North America, that was adopted as the guide of the Negotiations, so far as boundaries of territories were concerned. Upon that Map, all the Boundaries agreed upon were marked and delineated.

Whether the River called Magaquadavie was, or was not, what was formerly known by the name of the river Saint Croix cannot be of much consequence to consider now; because the question before the Board is not what was by the French in ancient times called The River Saint Croix, what was intended by a river of that name in the Grant of Nova Scotia by King James to Sir William Alexander, or what was called Saint Croix by the French or English before the Treaty of Utrecht. But the question is, What River was truly intended in the Treaty of Peace by the name of the River Saint Croix, and forming a part of the boundaries therein described?

It is well known, that when the French people first came to America, that in order to gratify their own superstition, and to form idolatrous ideas of terror in the breasts of the Savages, they raised a *High Cross* in every place where they landed; and nearly all the rivers in the Eastern Country, had in their turns the appellation of Saint Croix.

When King James made his Grant to Sir William Alexander, there could be no Map of the Country within his reach. We know that no accurate Charts were ever formed of Passamaquody Bay, the Bay of Fundy or the eastern shores of Massachusetts before Holland's survey about the year 1770. As King James had no adequate ideas of the Lands, Bays, seas or Rivers, it cannot be now of much consequence to this case to consider What he called The River Saint Croix.

But, what was known, contemplated or considered as the boundary of Massachusetts after the Treaty of Ryswick in 1697, after the year 1703, when the Government of that Province appears to have relinquished the land to the eastward of The Duke of York's Patent and province, and after the conquest by the English of Nova Scotia in 1710 and the Treaty of Utrecht in 1713, may be very important to be considered, because when it is proved by the testimonies of Mr Adams & Mr Jay that the boundary of Massachusetts on this point

* This is a mistake; as Mr Jay's deposition stands it does not prove who produced Mr Mitchell's Map at Paris.

was agreed upon as the boundary of The United States, they were naturally and necessarily led to fix upon the line contemplated or acknowledged before that time by the same parties under the Characters of a Mother Country & a Province.

The Commissioners at Paris in 1782 were therefore right in adopting for their guide a Map which was attended to by the Authority of Countries where the question of property was as interesting to both as it now is. This idea is suggested in the deposition. The President says, That he insisted upon the River Saint John's as the boundary, but his Colleagues observed that, as the Saint Croix was the River mentioned in the Charter of Massachusetts Bay they could not justify insisting upon the River Saint John's as an ultimatum.

In this expression as used by the Colleagues of M^r Adams, there is a want of accuracy. The River Saint Croix, or rather a place called the Saint Croix, and which had been the Northern and eastern boundary of the Duke of York's Patent, had been from the year 1703 considered as the boundary of Massachusetts, and what was intended by the expression used by the colleagues of M^r Adams was, That they could not be justified in insisting upon the River Saint John's as an Ultimatum, when it was clear that Massachusetts had never claimed to that River after the Treaty of Ryswick and before the American Independence.

M^r Adams, in his answer to the third Interrogatory, expressly says, That the Commissioners in fact agreed upon the River marked on Mitchell's Map as the river S^t Croix for the Boundary. If that is the fact then the conclusion inevitably follows, that this is the River which was truly intended in the Treaty of Peace by the name of the River Saint Croix, as forming a part of the boundary therein described.

In the answer to the Interrogatory put by the Commissioners, M^r Adams expressly says, that this agreement was absolute; that there was no reserve for receding from that River on either side, even though it should thereafter appear that there was a mistake in the map, for there was no suggestion or agreement of that nature; but, that both parties considered their nations as positively held, and Limited, by the lines there marked or rather by the River which the parties agreed to designate & to hold as a part of their boundaries. There is a variety of other Maps which show that the river marked upon Mitchell's map had always been considered as the boundary of Massachusetts. These will be attended to in the Argument upon what shall be considered as the source of the river and are therefore omitted in this place. They will all shew That the English

Nation had never, whilst the Massachusetts Bay was a province, contemplated a line similar to the one now claimed by the Agent for His Majesty.

Indeed the Commissioners on the part of America could have had no conception that such a line could ever be claimed by Great Britain under the Treaty of Peace, for the testimony of Mr Adams proves that the English Ministers would have been contented with the river Penobscot for a boundary. And it would have been vastly more to the advantage of the United States as a Nation, and to the State of Massachusetts as a Government to have had that River made the Boundary from the sea to its source.

The Lines now claimed by the English Government will give to that nation vastly more lands than the Boundary on the Penobscot would have given. It would also leave this part of America, a poor miserable strip on the Sea-Coast in the environs of a wide extensive and rich Country belonging to another Nation.

Sec. 18. But, there are other circumstances which had a powerful tendency to fix the eyes of the Commissioners on the Magaquadavie as the Boundary line. One of the American Commissioners had long been acquainted with the Controversy upon this very territory, between the Crown of Great Britain & the province of Massachusetts, not in a Controversy respecting which was The River Saint Croix, but whether the province should be continued to extend to that river. His attention had therefore been naturally turned to that part of the Country, and the other Commissioners would be naturally led to submit the direction of this question to his understanding and discretion.

The Controversy with the Crown, managed by the Agent of the Province before the Lords of Trade & Plantations, has been already mentioned, but there were other transactions which had been of great notoriety in the Province, and with which the learned and attentive Commissioner had been in publick Life intimately acquainted.

As soon as the peace was concluded in the year 1763, between the English and French Crowns, the Government of the province asserted its claim to the river Magaquadavie as the river Saint Croix to which there had been on the reasons before explained a consent that it should be restricted.

On the 14th [25th] of April in 1764 Governor Bernard issued his orders to John Mitchel appointed a surveyor for that purpose in the words following to wit:

*Instructions to M^r Mitchel and M^r Jones appointed to survey
the Bay and River Saint Croix*

You are to embark on a sloop with a party of men under the command of M^r Nathan Jones together with Capt. Fletcher, who is to be taken up at Pemaquid, and proceed to the Bay of Saint Croix or Passamaquody, and make an encampment there on some Island, or other convenient place. You are then to proceed to survey the Coast between rivers Saint Croix and Passamaquody, and eight miles up each of the said Rivers on the shores next to each other marking the opposite shores by estimate from view. You are next to survey the Coast from the mouth of the River Passamaquody, taking a trigonometrical measure from some certain point on the east side of the river across the mouth of it, (to connect the two surveys together) to the extreme point of the Bay on the west side, & if the river Passamaquody is very long [large] at the mouth you must survey up the river on the west side of it untill the Stream grows so narrow that you can measure a line across it by trigonometry.

You are also to survey the Island of Passamaquody and connect it to the Continent, by trigonometry.

You are also to take the bearings of the other Islands, by trigonometry so as to ascertain those places.

In the like manner you are to survey the east side of the Bay from the extreme point unto the mouth of Saint Croix River connecting it with the first survey by a trigonometrical line across the River as before. And in this survey to be very carefull to ascertain by trigonometrical observations, the place of the Island of Passamaquody and its least distance from the eastern shore of the Bay.

When this is done you are to go up the Saint Croix, for which purpose Capt. Fletcher will engage Indians with canoes to assist; and when you get above the point to which you have actually surveyed, you must proceed to survey the river by sighting and calculating as well as you can according to a method hereafter mentioned.

When you get to the head of the river you will find a Pond, which you must delineate as exactly as you can and particularly find out the most northern point of it so as to set it down in your plan.

When this is done one of you (or both, if you please,) with a party assisted by Indians with their canoes, must cross by the usual portage from the pond unto the river Madamawamkee, which falls into the Penobscot, and will carry you all the way to Fort-Pownall, with the stream. This whole passage must also be surveyed by bearings and calculations, according to the method following: but if there is not time, this last passage may be omitted.

Upon the water let a canoe go forward, whilst your canoe rests, and hoist a signal and stop; then do you take a sight of the signal, its bearings and go to the place and note the time of your going, by a watch; and calculate the rate of your going by so many miles and furlongs an hour as you with the opinion of your Company shall judge. Let the Signal boat go on, and you take bearing and follow,

as before. If you make several signal-staffs (which may be poles with a small white Flag at the top,) the signal canoes may keep going on, observing to fix a signal at every place which you take with you; And when the last signal is used, the signal canoe must stop, till you come up & give her all the signals again. In like manner you are to do by land, observing to make the length of the bearings as great as may be. As in this manner of surveying great dependence is had upon the computation of the distances, you should learn to measure distance by time by making some actual measure by water and land and noting the time of passing with stream or against, or in a good path or a bad one.

You are to keep an exact Journal of all your transactions, and of the particular work each party is employed in every day, and when the two surveyors are separated each is to keep a Journal.

The obliteration [omission?] in the first page is done with a view of not obstructing the General Work; but if you can do that business in the evenings so as to lose no time it will be the better.

BOSTON 25th April 1764.

I, John Mitchel of Chester in the County of Hillsborough in the State of New-Hampshire, Testify and say That the foregoing is a true copy of the Instructions given me by Francis Bernard, Esq^r., late Governor of the late Province of Massachusetts Bay, for my directions in the survey of Passamaquody-Bay, in the Year one thousand, seven hundred and sixty-four.

JOHN MITCHEL

SUFFOLK SS. BOSTON September 16th 1790.

Personally appeared Cap^t John Mitchel, and being first carefully examined and duly cautioned to declare the whole truth, made oath that the foregoing Deposition by him subscribed contains the whole truth on the subject to which it relates. Taken in *perpetuam rei memoriam*.

SAMUEL BARRETT	} <i>Justices of the Peace</i>
ISRAEL KEITH	
	} Quorum Unus

Before us signed.

Upon these Orders, Mitchel, Israel Jones, Nathan Jones, Abraham Duncan, & Joseph Bradbury proceeded to the river Magaquadavie; They examined the native Indians as to the Question—Which was the Saint Croix River? And were by them, acting under the solemnity of an oath, shewn the River last mentioned as the River of that name.

They surveyed that river accordingly, and made their return to the Government. That Return, of course, became a matter of Record, and thereby, a matter of publick notoriety.

The testimonies of the men above-named, being taken before the Board, are to be now more particularly attended to,

The orders described the river with so much exactness that it could not be mistaken; and a plan delivered to them on that occasion, a copy whereof is herewith exhibited and the original on the Table, show What River Governor Bernard then intended as the Saint-Croix; And that the same is the River now called The Magaquadavie.

It is true that the River designated on the plan delivered by Bernard to Mitchel, and others, is not an exact representation of the River now contended for by The United States. But it is the Eastern-River on the Bay of Passamaquody. And the Return and Field Book of Mitchel now here on the Table, verified by his testimony, and that of other witnesses exhibit the River Magaquadavie, as the River which Bernard instructed them to survey; and as the one which the Indians there at that time declared on Oath to be The River Saint Croix.

The Orders issued by Bernard to these Artists, and their return, are not now to be found upon the records.¹ They were then a matter of publick notoriety, and remained to be such forever after. Whether the plan which Bernard adopted for obtaining a hundred thousand Acres from the Governor of Nova Scotia rendered those papers of too little consequence to be preserved, cannot now be decided; but there happens to be Evidence enough in the Cause to prove that they once existed, and that the whole transaction was a matter of publick Governmental consideration.

This is not in strict legal proceedings evidence that the Commissioners at Paris in 1782 agreed upon the Magaquadavie as the Boundary. But it is proper evidence to encounter the argument or presumption on the Charter of Sir William Alexander. Argument on
Bernard's orders It is also very proper to show that the Commissioners of 1782 had other facts to proceed upon, and were not therefore influenced by the bounds described in that Charter, or by the Act of Parliament made in 1775 and referred to in the claim filed by the Agent for His Britannic Majesty.

The testimonies of John Mitchel, Israel Jones Esq., and Joseph Bradbury, Esq., are on file, showing fully, as well What River the native Indians called The River-Saint-Croix, as What River they under Governor Bernard's orders surveyed as that River, and as the then boundary of one part of the province of Massachusetts Bay.

John Mitchel's testimony is in these words.

¹ This means, were not to be found in the Massachusetts archives, from which, it is insinuated, Bernard removed them lest they militate against his grant. As has just been seen, a copy of the orders, or instructions, was obtained from Mitchel, to whom they were given, and his field notes and diary were also before the Commission.—EDITOR.

I the Subscriber an Inhabitant of Chester in the State of New-Hampshire voluntarily make the following declaration to wit: That I was employed by His Excellency Francis Bernard Esq^r, Governor of the Province of Massachusetts Bay in April 1764. as a surveyor in company with M^r Israel Jones as my deputy, M^r Nathan Jones as Commanding Officer, of a party of troops, and Cap^t Fletcher as Indian Interpreter, to repair to the Bay of Passamaquody, to assemble the Indians usually residing there, and from them to ascertain the River known by the name of The Saint Croix. We accordingly assembled upwards of Forty of the principal Indians upon an Island then called L'Atterele, in the said Bay of Passamaquody.

After having fully and freely conversed with them upon the subject of our mission, the Chief Commissioned three Indians to shew us the said River Saint Croix, which is situated nearly six miles north, and about three degrees east of Harbour Le Tete, and East-northeast of the Bay or River Schuduc, and distant from it about nine miles upon a right line.

The aforesaid three Indians, after having shewn us the River and being duly informed of the nature and importance of an Oath, did in a solemn manner, depose to the truth of their Information respecting the identity of the said river Saint Croix, and that it was the ancient and only river known amongst them by that name.

We proceeded conformably to this information in our survey, and in August following, I delivered to Governor Bernard three plans of the said River S^t Croix and the said Bay of Passamaquody.

JOHN MITCHEL

SUFFOLK SS, BOSTON, *October 9, 1784.*

The above named John Mitchel personally appeared, and on solemn oath declared, that the above by him subscribed is true.

Before me

EZEK PRICE

Jus: Peace

I John Mitchel of Chester in the County of Hillsborough and State of New Hampshire, do testify and say that the annexed is the original plan given me by His Excellency Francis Bernard, Esq^r, in the Year one thousand seven hundred and sixty four, for my direction in a survey of Passamaquody Bay to be governed by it in such survey, unless I could find Indians to ascertain the boundaries, and that three Indians of the Passamaquody tribe, appointed by the Chief met us at Harbour Le Tete, and went with us to the River Saint Croix, and being duly informed of the nature and importance of an oath did in a solemn manner depose to the truth of their information then given that the River Saint Croix as laid down in the annexed plan, was the ancient and only river known among them by that name.

JOHN MITCHEL.

SUFFOLK, SS. BOSTON 16th Sep^r 1790.

Personally appeared Capt. John Mitchel, and being first carefully examined and cautioned to declare the whole truth, made oath to the truth of the above deposition, by him subscribed: Taken in perpetuam rei Memoriam.

Before us

SAMUEL BARRETT
ISRAEL KEITH

*Justices of the Peace.
Quorum Unus*

I the Subscriber, An Inhabitant of Adams, in the State of Massachusetts, voluntarily make the following declaration, to wit: That I was employed as Deputy to John Mitchel Esq^r, Surveyor, who was appointed by Francis Bernard, Esq^r, Governor of the Province of Massachusetts Bay, to repair to the Bay of Passamaquody to assemble the Indians usually residing there, and from them to ascertain the River known by the name of St Croix. Went thither in Company with me the Subscriber, Col: Nathan Jones, as Commanding Officer of a party of Troops and Capt. Fletcher as Indian Interpreter.

The principal Indians were assembled upon an Island called L'Atterele in the said Bay of Passamaquady. After having fully and freely conversed with them upon the subject of our mission the chief sent a number of Indians to shew us the said river Saint Croix which is situated nearly six miles north-easterly of Harbour Le Tete, and nearly east northeast of the Bay or River Scudac; and distant from it about nine miles upon a right Line. The aforesaid Indians, after having shewn us the river and being fully informed of the nature and importance of an oath, did in a solemn manner depose to the Truth of their information respecting the identity of the said River Saint Croix, and that it was the ancient and only river known amongst them by that name.

We proceeded conformably to this information in our surveys, and in August following, a Plan of the said River Saint Croix and the said Bay of Passamaquody were delivered to Governor Bernard.

I further say that I know of no other River than that aforesaid, as the River St Croix. And which the said Indians shewed me, as the only River by the name of St. Croix in Passamaquody Bay that they knew as such. Which River I explored to its source, and there found a Pond, mentioned in my Instructions from Governor Bernard. Which agreeably to those Instructions, We then and there delineated, according to our best means and judgment.

ISRAEL JONES.

SUFFOLK, SS,
BOSTON, 23^d Feb^{ry} 1790.

Personally appeared Israel Jones Esq: and made Oath to the Truth of the foregoing deposition by him subscribed.

Taken at the request of James Boyd Esq: in perpetuam rei memoriam.

Before us { SAMUEL BARRETT { *Justices of the Peace*
 { ISRAEL KEITH { *Quorum Unus.*

Being requested by the Honorable James Sullivan Esq^r, Agent for the United States, to give evidence of what I know respecting the River S^t Croix, say, that after reading a Journal I then kept, can safely testify to the following narrative, being at that time more than twenty three years old.

At York in the Commonwealth of Massachusetts, on the eleventh day of May, one thousand seven hundred and sixty four, I engaged with Cap^t Nathan Jones who was employed by the Governor of the then Province of Massachusetts Bay to settle the line between that province and the Nova Scotia Government.

The party under Cap^t Jones were, John Mitchel & Israel Jones, Surveyors, Josiah Woodward, James Mansfield, Abraham Duncan, Ephraim Pierce, Samuel Ball, Elisha Severns, William Disney, and two men by the name of Allen as Chainman and Boatman.

One of the Allens deserted at York which was the occasion of my going. On the 14th of May called at Pemaquid, and took on board Thos. Fletcher, Esq^r an Indian Interpreter.

On the 26th of May arrived at Passamaquody, and landed our stores at a small Island called L'Atterle, built a Camp, and made it our Head Quarters.

On the 28th went in a whale boat—having a M^r Boyd a Scotch Gentlemen who lived on the Island where we encamped, and, who most part of the time went with us as an assistant, being acquainted with the Country.

On the 29th landed our surveyors and Chainman, at a place called point Lue. Capt. Jones with a Boats-Crew, of which I was one, went up to a river called Schuduc, where a Capt. McCowan & Nichols, and others were at the Falls catching Fish, such as Shad and herring, &c. The Surveyors proceeded in their business till the fourth of June, when the whole party in two whale boats, went to Harbour Le Tete, where a considerable number of Indians had encamped.

On the 5th four Indians came on board the boat I belonged to. We proceeded to a river called by our people *St. Croix*, but called by the Indians Macadavie. At 12 o'clock we landed at a point of rocks near the mouth of the river.

The Interpreter Esq^r Fletcher, talked with the Indians some time, and to the best of my remembrance, the ceremony of an Oath was administered, but I will not be positive as to that circumstance. After he had done conversing with the Indians, Esq^r Fletcher said in my hearing, that the Indians said or swore, that the river where we then were, was the true River Saint Croix, and that they never knew any other River by that name.

We then went up to the first Falls, which is about five miles from the entrance of the river—then crossed the Carrying place into the Fresh Water, and dismissed the Indians.

On the 20th of June Capt. Jones in the Whale Boat, and a small fishing canoe built with boards went up to the same Falls above mentioned, when we carried the Canoe over the carrying-place which was called half a mile.

Capt. Jones, Israel Jones, Surveyors, Josiah Woodward & myself, went up the river five miles, to where the river parts & there encamped that night. The next morning (21st) took the eastern or right-hand branch, after rowing two or three miles, came to a large pond, took the left hand shore, & rode quite round the pond, which took us most part of the day. As the surveyor Israel Jones took the different courses, the difference he judged by the time it took to row from one object to the other, which he did the whole distance of the river, so far as we went up. On the opposite side of the pond from the entrance, there was a Carrying-place, which we followed till we came to salt water, and salt marshes. I think it was called Little S^t Johns.

On the 22^d took the northern branch, &, after rowing eleven miles, came to the second Falls where the water fell almost perpendicular. The river above the second Falls, appeared to be very rapid as far up as we could see. The next day went back to our quarters.

On the 30th of June after finishing the survey, embarked on board Capt McCowan for Boston. And I further say that I was twice up to the Western River Falls, which river I never heard called by any other name but Schuduc. But the Eastern River where the Indians went with us, I often heard it called Macadavie, and further saith not.

JOSEPH BRADBURY

United States of America	}	COMMONWEALTH OF MASSACHUSETTS, YORK COUNTY <i>August 4th 1796.</i>
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Captain Joseph Bradbury, appeared before me the subscriber, one of the Judges of the Court of Common Pleas for the said County of York, and made oath that the narrative by him signed and to which this Certificate is annexed, is True. The same being sworn to on the request of James Sullivan, Esq^r, Agent for the United States in settling the Boundary line of said States with the Government and Dominion of His Britannic Majesty at the River Saint Croix.

In testimony whereof, I have hereunto set my hand and seal, the day and year above written.

[s]
RISHWth JORDAN

Commonwealth of Massachusetts:
By His Excellency

[LS]
SAM^l ADAMS

SAMUEL ADAMS, Esquire
Governor and Commander-in-Chief

To all whom it may concern.

Know Ye, That Rishworth Jordan, Esq^r is one of the Justices of the Court of Common Pleas within and for the County of York in said Commonwealth, duly constituted and sworn, and that to his

Acts and Attestations, as on the paper annexed, full faith and Credit are and ought to be given in and out of Court.

In testimony whereof I have caused the public seal of the Commonwealth to be hereunto affixed this eleventh day of August, A.D., 1796, and in the 21st year of the Independence of the United States of America.

Attest JOHN AVERY, *Secretary*.

Sec. 19. In the year 1770 Governor Hutchinson issued a Commission with the advice of the Council to General Brattle, the late Governor Bowdoin, and M^r Hubbard, who made their return in these words:

When we consider the description given by M. Champlain, who we apprehend was the first European that reconnoitred the Eastern Shores, and gave the River Saint Croix its name, we are convinced that the River Saint Croix mentioned in the Royal Charter can by no means be the River Passamaquodie, but that the River Passamaquodie being an Indian name was then known thereby.

When we consider also that there is a living Witness who will swear that about sixty years ago, he used to trade at Saint Croix, that by the Indians he traded with, who were born there and always lived there, by the oldest of them who had it from their Fathers, The River Saint-Croix aforesaid, was known by that name; and that Saint Croix runs east of Passamaquodie. When we consider these things and many more we could mention, it is plain to us That the River Saint Croix, which we call by that name and which is east of Passamaquodie, is the true River Saint Croix, and the Eastern Boundary of the Province as mentioned in the Charter.¹

It is true, that this Report is in some instances incorrect, but yet that incorrectness does not rob it of any part of its weight in this Case. The Report is offered only to shew that the Claim of the province to the eastern river was a matter of Notoriety and could not but be known to M^r Adams to whom this part of the boundary must have been confided.

Sec. 20. Against all this there is, as the Agent for the United States conceives, nothing to be urged but an Act of Parliament, unconstitutional and illegal by the principles of the Government where it was made; and even under that circumstance, as conscious of doing wrong, unless the prerogative of regulating trade could sanctify it to that use, declaring its own purpose to be foreign to a permanent settlement of Boundary, or to give a decision upon provincial real property.

Sec. 21. The Map of Doct^r. Mitchell has been shown, and spoken

¹ The text here substantially corresponds with the version given in the Baxter MSS., Coll. Me. Hist. Soc., 2nd Ser., Vol. XIV, p. 142.—EDITOR.

upon. The Agent for the United States has now to ask the attention of the honorable Board again to that Map. On the face of it appears to be drawn the Boundaries of the United States, as contended for by their Agent. The Eastern River is marked as The Saint Croix, and a line is drawn from it to the Highlands.

Proposal for
Witnesses

It is readily seen that the Rivers laid down on that Map were not made from actual survey, and that the interior part of the Country was then unexplored; but still the Eastern River in the Bay of Passamaquoddy is noticed by having the line of division between the Nations drawn from it. That this line was then drawn and agreed to, as a line on and from the River Magaquadavie in the Treaty of peace and that that River was truly intended as the Saint Croix and as a part of the Boundary therein described, will now be established by the Testimony of Witnesses.

The Testimony of Captain Nicholas Awawas aged 67 years, Thomas Louis, aged 28 years, Joshua John Thomas aged 36 years, John Baptiste and Francis Nicholas aged 22 years, Anthony aged 23 years, John Thomas aged 20 years, and Gabriel aged 21 years, Indians of the Passamaquoddy & Machias Tribes, produced as Witnesses on the part of the United States, and sworn and examined in the presence and hearing of each other before the Commissioners. John Baptiste a white man being sworn as Interpreter.

ST. ANDREWS, Oct. 7, 1796.

Capt. Nicholas Awawas saith that the Indians called the Bay beyond Deer Island Sea and from Deer Island to Saint-Andrews, they called it Bay. That the Indians call the Megagwadavy, Saint Croix. That he has heard no other name for the Megagwadavy, than Saint Croix since he was a boy. That there is but one Cross, by which he means that the French put up only one Cross, that the French gave it that name. That the Indians call the waters from Brewers upward Schootuck—because they go up the rapids.

That there is no river called Passamaquoddy but that the whole Bay, comprehending the Megagwadavy, the Schootuck, and the Diggitygwash is called the Passamaquoddy. That there was a Cross put up at S^t Andrews-point, and it was standing until about fourteen years ago, and was put up by S^t André, a Priest. That the first Cross was at Megagwadavy, and two days after, a Cross was put up at S^t Andrew's point, and then it was called St. Andrews. That they were not the same Cross, and whenever a Cross became rotten the Priest put up another. That he never heard the point now called Saint Andrew's point called Point S^t Louis. That the French were the first white people who settled at S^t Andrews: That the Indian name of the Little Island, near Devil's Head is Muttanagwis, and the name of the Great Island there is Muttana-

gwamis, which signifies a place like a Store or Chest. That there was a Fort on the Great Island, that he had understood the French first landed at Magagwadavy, and then they came to St Andrew's point and then they went to Muttanagwamis. That the first time the French came there were two Vessels, and one remained here, and when they came again they found that all the men who remained had died, and the vessel which came the second time finding that all the men who had remained were dead, went away. That he has seen a Cross which had been put up at the Schootuck, at the Carrying-Place. That he has not ever known the Schootuck called Saint Croix. That the branch of the Schootuck which runs northward is called Chiputnatecook. That Schootuck means a place which has been burnt. That the Lakes shewn to him on the Maps are generally called Schootuck Lakes, but have also particular names. The other seven Indians severally said that as far as they respectively knew or had heard the matters as testified by Capt. Nicholas Awawas were substantially true.

Sec. 22. When the people who are settled on the Land in Controversy find that the claim of the United States is urged against the

That the Settlers under the British Government, ought not to consider the Claim of the U: S: as hard against them

Government of Great Britain with seriousness and zeal, they may be induced to think themselves treated with a degree of severity which they may not have feelings readily to excuse. That no imputation of this kind may rest against the States or against either of them, their Agent thinks it his duty to lay before

the honorable Board and consequently before the public a few important facts on this point. He does not consider the facts which he is about to produce the evidence of as merely a justification on principles of strict right, but as evidence of the continuation of an old claim and evidential of the truth of the proposition, that the Commissioners at Paris in 1782, by the River Saint Croix mentioned in the Treaty, truly meant and intended the river called by the Indians The Magaquadavie.

For when there is a general opinion clearly established, in which the publick at large has no interest, we should be led to conclude that it originated in the assertion of the claim of a party who had an interest in the business.

Sec. 23. The Treaty of Peace was concluded in Europe on the third day of September 1783. The Preliminary Articles having been signed

The Settlers were warned at an early period of their error

on the 30th of November 1782, the people who took possession of the Country between the Magaquadavie and the Scoudiac were American Loyalists, who had continued their Allegiance to the Crown of Great

Britain. They were, no doubt, induced by an opinion formed in con-

sequence of the Act of Parliament passed in 1775 and by the peculiarity of their circumstances to take possession of the point of Saint Andrews.

And had the Government of Massachusetts remained silent spectators of the improvement there made, it would justly have furnished an Argument that the State had no claim to the territory: but the Case was not so. There are three several Letters before the Board dated the eleventh of August 1783—the thirtieth of September 1783—and the fifteenth day of December in the same year, written by John Allan, Esq^r., who was in that Country, Superintendent of Indian affairs for Massachusetts, and who is present now before the Board to verify the facts contained in them under oath, and for which purpose the Agent for the United States moves that he may be sworn.

By his testimony it will appear that he informed the people who resorted to Saint Andrews, under the English claim, that they were quite mistaken, and were within the State of Massachusetts.

Sec. 24. On the third day of October in that year, the General Court of the State of Massachusetts, having taken up the matter, passed a Resolve, a copy of which, attested to by the Secretary of that State, is now offered. By that Re-
General-Court
Proceedings
 solve, which was introduced as a measure upon the Letter of John Allan, Esq^r. dated the eleventh of July, then next proceeding [preceding], it appears that the Legislature there[by] requested the Governor to obtain an authenticated state of facts respecting those people settling at Saint Andrews, and to lay the same before the General Court.

Sec. 25. It appears by a Report of Aaron Dexter Esq^r duly received and recorded, that he in September of the same year, was with the Governor and the Surveyor General of Nova
Governor &
Council's Pro-
ceedings
 Scotia, who then had notice of the uneasiness of the State of Massachusetts on the subject, and who then declared that the Cobscook was the River Saint Croix, and gave their reasons for that assertion, which reasons are contained in the Report and can now be verified to have been so given, by the oath of the said Dexter, who is now before the Board.

Sec. 26. From that time to the day when the Treaty of Amity, Commerce and Navigation, was concluded between the two nations, the State of Massachusetts has been incessant in its attempts and applications to have these encroachments removed.
The proceedings
of Massachusetts
notorious, altho'
no recourse was
had to force

These attempts have been conducted by measures of publick proceedings and Acts of the highest notoriety. It is true

that the State of Massachusetts did not have recourse to force in order to remove the encroachments, which, by the way, might have been well justified; but will it follow, that from the prudent and peaceable conduct of one party, the other shall acquire a right?

Sec. 27. The testimony of John Albe[e], is offered to shew that he, under the orders of the State of Massachusetts, warned those settlers to depart, on their first entry, and the records of that State and of Congress, copies of which are on the table, numbered from 1 to *** inclusively, exhibit proof of the proceedings of that Government, and the Government of the Union, against those settlers, and furnish complete evidence that their misfortune, if any they should now suffer, is the result of their own error and the mistake of the officers of their own Government.

Sec. 28. The report of Charles Morris, Esq^r., Surveyor General of Nova Scotia, made in the year 1789, did much towards a continuance of the wrong. His report is on the table, and has these words in it, viz.,

Mr Bernard, Governor of Massachusetts Bay, in the year 1764, caused a survey to be made, and proposed to the Governor of Nova Scotia the making of Grants of Land as being within the Massachusetts Government. The next year Mr Wilmot, the Governor of Nova Scotia, sent his Chief Land Surveyor to make a Survey of that Bay, also; and upon full enquiry it was found that there were three rivers emptying into the Bay, which were called Saint Croix, that the river called The Cobscook was anciently called by the French Saint Croix, and on examining into the original grants of Nova Scotia, it evidently appeared that the Grant made by King Charles the 2^d to his brother the Duke of York in 1663 called the Duke of York's territory was bounded by the river Saint Croix, eastward & by the river Kennebeck, westward. That on the twelfth of August the same Year, Sir William Alexander obtained a Grant of Nova Scotia, to wit. Bounded westerly as far as the river S^t Croix, and to the furthest Source or Spring of that river, which comes from the west to mingle it's waters with those of the river S^t Croix and from thence running towards the north &c.

All the Islands &c, in Passamaquody-Bay, have ever since been deemed as included in that Grant.

Whether Schooduk,—or Whether Cobscook is the river the Treaty fixes upon for a boundary, I will not undertake to say, but, from the manner in which those boundaries are expressed, I should imagine that river to be the river Saint Croix, whose source should be found furthest into the Country, westward and northward towards the Highland mentioned in the Treaty, being conformable to the old grants of Nova Scotia; And [if] my conjecture is well founded, the Saint Croix mentioned in the treaty cannot be effectually and

properly ascertained until accurate surveys are made and proper commissioners appointed to determine thereon.¹

M^r Morris has mistaken the date of the Grant to Sir William Alexander, but his conjecture respecting the Course of the River intended by the treaty is upon principles similar to those which support the argument in favor of The United States Claim. Argument on
Morris's Report

The true River is to be found to be that River whose source is furthest in the Country *Westward* and *Northward*. If there is any meaning in this mode of expression, as there surely is, the source by him described is to be between North and West.

But the waters claimed now by the British Government have their source between the South and West. His reasoning is founded in the idea, that such a course westward and northward, is conformable to the old Grants of Nova Scotia. Morris was at that time quite ignorant of the Scoudiac Lakes, of the sources of the Rivers, and of the interior part of the Country.

Sec. 29. By this Report it appears that the Government of Nova Scotia, at that time, had no determinate idea whether to fix on the Cobscook or the Scoudiac as the river they intended to claim to [by] force of the Treaty, as the river Saint Croix; and that there was at that time, on that side of the Question, no value, estimate or dependence placed either in the Act of Parliament of 1775, on the Map of Des Barres, or any ancient Chart, or any tradition or reputation, by themselves then known respecting either of those two rivers—which have been called the Saint Croix River. The report of Morris and what he said to Dexter in 1783, shew how much he was mistaken in another point when he said that Governor Bernard fixed upon the Cobscook which he (Morris) called the Little Saint Croix, as the boundary. Whereas, in fact, it has been made fully to appear from good & substantial proof, that Bernard received his Grant from the Governor of Nova Scotia upon an idea that the Government of Massachusetts would finally relinquish all those lands east of Penobscot, to the Crown. Besides if he considered the Cobscook as the boundary, he acted inconsistently, for a part of his grant from Nova Scotia was west of that river, but if he did not act upon such views, yet Governor Bernard had no authority to establish a Boundary. He was not appointed for that purpose, nor would he then have been considered by the General Assembly, as a suitable Agent in that business.

Sec. 30. The Agent for The United States will not take up more

¹ See *infra*.

time on a point, which however necessary it might be to touch upon it, yet it cannot be of importance to be minute in it. The Proceedings of the Massachusetts Legislature, the Resolutions of Congress, the Instructions of Congress to their Foreign Ministers on this Subject, the incessant publick attention to it, and, more especially, the Letters interchanged by the Governors of Nova Scotia, and Massachusetts, & New Brunswick, which are under the eye of the Honorable Board, will give every necessary explanation on this head; and shew with what unabated ardour the States have pursued their Claim to the Country on Passamaquody Bay to the Magaquadavie.

One remark may however be obviously necessary in order to shew that the settlers at Saint Andrews were acquainted with these proceedings at the earliest, and through every stage of their progress.

Sec. 31. Early in the year 1784 The General Court of Massachusetts passed an Act which is on the Table, requesting the Governor there to appoint Commissioners to proceed to the Bay of Passamaquody and to enquire into the encroachments which had been made by Subjects of His Britannic Majesty on the Land of the State.

Whereupon Benjamin Lincoln, Henry Knox and George Partridge Esquires, were by the Governor with advice of the Council, appointed on the Commission. The Commission could not but derive great importance from the Solemnity of the measure, as well as from the Characters which filled it.

Sec. 32. The two first named of these Gentlemen undertook to execute the trust, and after having been at Saint Andrews, examined the native Indians, viewed the River, and made every possible enquiry, they made the Report which is now before the honorable Board, and dated the 19th of October 1784. They say:

From every information the subscribers could obtain, on an enquiry of the Indians and others, The Eastern River was the original St Croix. This is about three leagues east of Saint Andrews, where the British inhabitants have made a settlement.

They add,

Although the mouth of the Saint Croix is but little more than three leagues east of the banks of the Scoudiac, on which the British subjects are settled, yet, from the different courses of the two rivers, the source of the Western branch of the Scoudiac is nearly one hundred miles from the source of the Saint Croix.

It is very clear that the opinion, proceedings and Report of those Gentlemen, must have been well known to the settlers on the Scoudiac

Papers on the
table exhibit the
evidence of what
has been asserted

Gen^l Lincoln—
& Gen^l Knox a
Committee &
their report

& Saint Andrew's point, at that time. They also advised in their Report that Release should be made to those settlers of the Land whereon they had settled as a free Gift.

The Government of Massachusetts was disposed to have paid the most perfect attention to that Report; and opened the door frequently to negotiations upon the substance of it, and have acted ever since with a view to regard it, as the basis of all the proceedings had on the subject; all which appears by the papers on the Table before mentioned and under the numbers before described. But the Governments of Nova Scotia & New Brunswick have refused all negotiations in the business.

Wherefore—If any of their Subjects shall be sufferers in the final result, the United States, or either of them, cannot
be considered as the reprehensible cause of their
misfortune.¹

Conclusion

¹ The text of the foregoing Statement, in the Department of State, is followed by this certificate: "A True Copy from the Originals, filed with me./Ed Winslow,/Secretary to the Commissioners &c." For comments on the copy thus certified, and on the Statement as here reproduced, see *infra*.

2

MR. CHIPMAN'S STATEMENT
OR
"FIRST ARGUMENT"
AND
REPLY TO MR. SULLIVAN

2. MR. CHIPMAN'S STATEMENT, OR "FIRST ARGUMENT"; AND REPLY TO MR. SULLIVAN¹

1. FIRST ARGUMENT

To the honorable the Commissioners appointed pursuant to the fifth article of the Treaty of Amity, Commerce and Navigation, concluded between his Britannic Majesty, & the United States of America on the nineteenth day of November 1794 to decide what river is the River St. Croix, truly intended under the name of the river St. Croix by the Treaty of Peace between his said Majesty, and the said United States, and forming a part of the boundary therein described.

The underwritten Agent of his Britannic Majesty, having in his memorial of claim preferred to this honorable Board on the fourth day of October last specified the river St. Croix, commonly called by the Indians Scoudiac, to be the river St. Croix truly intended under the name of the river St. Croix in the Treaty of Peace, between his said Majesty and the United States of America, and forming a part of the boundary therein described, he will now proceed to evince the truth of the grounds and principles of that claim. In doing this, he will argue upon no facts which are not authentic, and no evidence which is not conclusive, and he is so fortunate as to be able to support this claim, not only by the most authentic documents and acts of State, both of the English and French Nations, to whom the premises in question alternately belonged during the greatest part of two centuries, previous to the said treaty, but by a concurrent and uniform series of authorities, drawn from all the historians of credit that have given any account of this part of the world.

It has been very judiciously observed on a former occasion by one of the members of this honorable Board, that the agreement, between Great Britain and the United States to terminate this dispute in the manner pointed out in the 5th article of the treaty of 1794, furnishes a proof of the humanity of the two countries, and that it is to be hoped in case the powers therein delegated should be exercised with

Benevolent
purpose of
Article V

¹ The text is taken from the copy in vol. 4 of the records deposited in the Department of State, in which it is certified by the secretary of the Commission as a true copy of the original filed with him. Nevertheless, inconsistencies exist throughout in spelling and punctuation, and there is often a want of indication of the place where a quotation begins or ends. For comments on records, see *infra*.

Mr. Chipman's statement, unlike that of Mr. Sullivan, is not divided into sections, nor did he indicate the succession of topics by notes on the side of the page. The notes of that character here given are those of the editor.

the spirit with which they were granted, that the Nations of the Earth may learn in future to settle more of their disputes without resorting to arms; and the *express* object of this treaty between his Britannic Majesty and the United States is to terminate their differences in such a manner as may be best calculated to produce mutual satisfaction and good understanding.

In determining therefore the question referred to this honorable Board, to be impartially and finally examined and decided by them, according to such evidence as shall respectively be laid before them on the part of the British Government and of the United States, it is of far less importance to either of these powers to succeed in obtaining a decision in favor of the river it claims, as the river St. Croix intended by the Treaty of Peace, than that such decision should be founded upon evidence so clear as to produce mutual satisfaction to both parties, whatever may be the disappointment to either in losing a portion of territory, it had been wont to consider as its own. Should it happen for want of thorough information upon the subject, that the decision should be liable hereafter to be impeached as erroneous, instead of cementing the good understanding so desirable between the two countries, it would be but sowing the seeds of future animosity, to burst forth when a convenient opportunity should offer.

From these considerations the underwritten Agent of his Majesty feels a peculiar satisfaction in the reflection that the characters of the Commissioners, before whom he has the honor to manage the business, on behalf of the British Government on the present occasion, must preclude all anxiety respecting the event of the cause he is engaged in, so far as it depends upon abilities to discover and magnanimity and integrity to adopt that line of conduct in their decision, which will be supported by the unerring principles of truth and justice. He is thus relieved from the apprehensions, which would otherwise be justly excited by the industry, ingenuity, and talents he contends with, in the Agent appointed and authorized to manage the business on the part of the United States.

The underwritten Agent has accordingly endeavoured to ascertain, from the most authentic sources of information within his reach, such facts as might lead to a discovery of what river was truly intended under the name of the river St. Croix mentioned in the Treaty of Peace; and he feels himself amply rewarded by the result of his researches, confident that he can demonstrate with a degree of certainty, hardly to have been expected, the truth and justice of his Majesty's claim.

In discussing the question under consideration, he will endeavour with as little deviation as may be, consistently with perspicuity to follow the arrangements of facts, adopted in his memorial of claim, already submitted to the Board, and he hopes to evince to the full satisfaction of each of the Commissioners the truth of the premises there laid down, and the fairness of the conclusions he has there drawn from them.

To facilitate the investigation of the present question, there is one leading principle that appears to be explicitly established by the very terms of the Treaty of Peace, and which might indeed be fairly considered as an axiom in the present discussion, namely. "That it was clearly intended by the second article of this treaty, that no part of the Province of Nova Scotia, should be thereby ceded by his Majesty to the United States." The words made use of in that article will not admit of a different construction, the United States being expressly bounded East by the western boundaries of the Province of Nova Scotia. The description in the treaty of this part of the boundaries of the United States is as follows: "From the northwest angle of Nova Scotia, viz. that angle which is formed by a line drawn due north from the source of St. Croix River to the Highlands; along the said Highlands which divide those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean." Now if the Northwest angle of Nova Scotia agreeably to these clear and express words of the Treaty, is formed by such a North line, from the source of the St. Croix to the highlands, that North line, and those high lands, must be the Western and Northern boundary lines of Nova Scotia.

No part of Nova
Scotia ceded by
Treaty of Peace

The treaty goes on,

East, by a line to be drawn along the middle of the river St. Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid Highlands . . . comprehending all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part, and East Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean; excepting such islands as now are, or heretofore have been, within the limits of the said province of Nova Scotia.

Here the line along the middle of the river St. Croix from its mouth in the Bay of Fundy to its source, is evidently one "of the aforesaid boundaries," as it joins the line, north from that source to

the high lands, which as we have seen, must be at least a part of the Western boundaries of Nova Scotia, to give the requisite angle for the first or place of beginning; and the exception of the Islands which then were, or there[to]fore had been within the limits of the said Province of Nova Scotia, evidently confirms the intention of the Treaty to have been to secure to Great Britain all the Territory, that then was, or theretofore had been a part of the Province of Nova Scotia. The words here used "said province of Nova Scotia," clearly shew that by the words Nova Scotia, in the former part of the article a Province of Nova Scotia, whose limits were defined was referred to and contemplated, and not an indefinite tract of Country, generally known by that name, whose bounds were uncertain. These words in the latter [part] of the article also shew, that the limits of the Province of Nova Scotia had been theretofore or anciently defined and established, and that within those limits certain Islands had been contained, and that by the general term Nova Scotia in the preceding part of the article that ancient Province was intended within whose limits those Islands were contained. To give a different construction to these words would render them altogether nugatory and contravene the intention of the Treaty, clearly expressed by them. The words "excepting such islands as now are, or heretofore have been, within the limits of the said province of Nova Scotia," which will be more fully remarked upon in a subsequent part of this argument, plainly shew that the Treaty contemplated the western limits both of the modern and ancient Province of Nova Scotia, exclusive of the Islands, to be the same; and it will presently be made to appear that this was the fact, not even excluding the Islands, excepting the Island of St. John, erected into a separate Government after the peace in 1763; and that the limits of the Province of Nova Scotia at the time of the Treaty of Peace, were the same that were established, when the Province was anciently and originally erected and named, in every respect, excepting the said Island of St. John, and the Northern boundary line, which by the erection of the Province of Quebec after the peace in 1763 was altered from the Southern bank of the river St. Lawrence to the highlands, described in the article of the Treaty of Peace, now under consideration; and further that with these exceptions there never was but one and the same tract of Country and Islands that formed the Province of Nova Scotia.

There can be no doubt then that the boundaries above recited from the second article of the Treaty of Peace were supposed to be, and mentioned as known and established limits of the Province

of Nova Scotia. This will appear still more evident when the originally established boundary of the Province of Nova Scotia comes under consideration.

Taking it for granted then, that by the second article of the Treaty of Peace, it was intended that no part of the Province of Nova Scotia should be thereby ceded by his Majesty to the United States, but that the Province of Nova Scotia according to its ancient limits, should be and remain a part of the Territories and Dominions of his Majesty, as his Majesty then, and before that time, had held and possessed the same; the object of our enquiries will simply be, what were the western limits of the Province of Nova Scotia, or in other words what river was the river St. Croix, forming a part of the Western boundaries of that Province; and if it can be shewn that the river Scoudiac so called by the Indians is this river St. Croix, and that a line along the middle of it, to its source, together with a line due north from its source, formed a part of the Western boundaries of the Province of Nova Scotia, and that the highlands formed the Northern boundary line of this Province at the time the Treaty of Peace was made, so as to form the North-west angle of Nova Scotia, by these western and northern boundaries; the intention of the Treaty of Peace is at once ascertained in the great point in controversy, and no other river than the river Scoudiac can be the river truly intended under the name of the river St. Croix mentioned in that treaty and forming a part of the boundary therein described.

Western limits
of Nova Scotia

We come now to the original creation and appellation of the Province of Nova Scotia, which never had an existence by name or limits, till the date of the Charter, Letters Patent, or Grant to Sir W^m. Alexander, passed on the 10th day of September 1621. The words of that Grant so far as they respect the present question, here follow:

Grant to Sir
William Alexander

We do by these presents give, grant, and convey to the said Sir William Alexander his heirs & assigns, all and singular the lands upon the continent, and the Islands situate, lying, & being in America, within the head or promontory, commonly called Cape Sable in the latitude of forty three degrees nearly or thereabouts, from that promontory along the shore, stretching to the west to the bay commonly called Saint Mary's bay, thence to the North, by a direct line crossing the entrance or mouth of the great bay, which extends Eastward, between the Countries of the Suroquois & Etchemins, so commonly called, to the river commonly called by the name of the Holy Cross or the Saint Croix, and to the furthest source or spring upon the Western branch of the same,

which first mingles its waters, with those of the said river, thence by an imaginary direct line, to be drawn or run through the country, or over the land to the North, to the first bay river or spring emptying itself into the great river of Canada, and from thence running to the East along the shores of the said river of Canada to the river, bay, or harbour, commonly called and known by the name of Gachepe, or Gaspee, and from thence South East to the Islands called Baccalaos or Cape Breton, leaving the same Islands upon the right, and the gulph of the said river or bay of Canada & Newfoundland with the Islands thereunto belonging upon the left, & from thence to the head or promontory of Cape Breton aforesaid, lying near the Latitude of Forty five Degrees or thereabouts, and from the said promontory of Cape Breton to the Southward & westward to Cape Sable aforesaid the place of beginning, including & comprehending within the said Coasts & shores of the Sea, and the circumferences thereof from Sea to Sea, all the lands upon the Continent with the rivers, torrents, bays, shores, Islands, or Seas lying near to, or within six leagues from any part thereof, on the western, northern, or eastern parts of the said Coasts & precincts of the same, and to the South East where Cape Breton lies, & to the Southward thereof where Cape Sable lies, all the Seas & Islands to the South within forty Leagues of the said shores, including the great Island, commonly called the Isle of Sable or Sablon, lying Southsouth-east in the Ocean about thirty Leagues from Cape Breton aforesaid, and being in the Latitude of forty four Degrees or thereabouts. All which lands aforesaid, shall at all times hereafter be called & known by the name of Nova Scotia, or New Scotland in America. And if any questions, or doubts shall hereafter arise upon the interpretation or construction of any clause in the present Letters Patent contained, they shall all be taken and interpreted in the most extensive sense, and in favour of the said Sir William Alexander, his heirs & assigns aforesaid.^a Moreover we of our certain knowledge, our own proper motion, regal authority, and royal power, have made, united, annexed, erected, created, & incorporated; and we do by these our Letters Patent, make, unite, annex, erect, create, and incorporate, the whole and entire Province, & lands of Nova Scotia aforesaid, with all the limits thereof, Seas &c^a, Offices and Jurisdictions, and all other things generally and specially above mentioned, into one entire and free dominion and barony, to be called at all times hereafter by the aforesaid name of Nova Scotia.

^a "Præterea nos ex certa nostra scientia, proprio motu, autoritate regali et potestate regia, fecimus, univimus, annexavimus et ereximus, creavimus, et incorporavimus, tenoreque præsentis chartæ nostræ, facimus, unimus, annexamus, erigimus, creamus et incorporamus totam et integram prædictam provinciam et terras Novæ Scotiæ, cum omnibus earundem limitibus, maribus, &c^a, officiis, et jurisdictionibus, omnibusque, aliis generaliter et particulariter supra mentionatis in unum integrum et liberum dominium et baroniam per prædictum nomen Novæ Scotiæ, omni tempore futuro appellandum." [This quotation, as the reader will perceive, is the Latin original of what follows the word "aforesaid."—EDITOR.]

In this grant, we find the original erection, appellation and establishment of the Province of Nova Scotia and a description of its boundaries which have remained from the date of the grant in 1621 to this day unchanged except so far as they have been altered by the subsequent erection of the British Provinces of Quebec and New Brunswick; but the western boundaries have remained invariably the same from the date of this grant to the present time.

This grant was afterwards renewed and confirmed nearly in the same words by letters Patent from King Charles the first dated the 12th July 1625.

Let any man compare the description of the western boundaries of the Province of Nova Scotia in this grant, with the description of the Eastern boundaries of the United States in the second article of the Treaty of Peace, and it is presumed, it will be impossible to resist the conviction that the latter was dictated and governed by the former.

Conformity of
grant and Treaty
of Peace

The Province of Nova Scotia in this grant is bounded westerly by a line crossing the mouth of the Bay of Fundy from Saint Mary's bay to the river commonly called by the name of the St. Croix, and to the furthest source or spring of the Western branch thereof, thence by a line directly North to the first bay, river or spring, emptying itself into the great river of Canada or St. Lawrence.

The United States by the second article of the Treaty of Peace are bounded East by a line to be drawn along the middle of the river St. Croix from its mouth in the Bay of Fundy to its source, and from its source directly North to the highlands &c^a.

This grant to Sir William Alexander is also perfectly consistent with the principle above mentioned, "that it was clearly intended by the treaty of Peace that no part of the Province of Nova Scotia should be thereby ceded by his Majesty to the United States," for the United States are by that Treaty bounded East by the river St. Croix, and we see by this grant, that the river St. Croix is part of the original western boundaries of the Province of Nova Scotia.

One other obvious remark is, that by this grant the river St. Croix retains the same name to the remotest source or spring of its western branch.

It may be proper in this place to observe, that until this grant passed to Sir William Alexander no Province, Country, District, Territory, or Place, whatsoever in America, was ever called or known by the name of Nova Scotia.^a

Name Nova
Scotia originated
with grant

^a "The name of Nova Scotia, which first took its Rise from the Letters Patent

For the truth of this assertion, exclusive of there being no evidence whatever to the contrary, not only every historical account of this part of America from its first discovery may be confidently appealed to, but the name is naturally accounted for as originating with this grant, from the consideration, that King James who made it, was King of Scotland when he mounted the English Throne, that he was the first King of Scotland that ever swayed the British Sceptre, that Sir William Alexander was of respectable Scottish extract, and high in office and rank in that Kingdom, and that this Province was by the grant itself held of the Kingdom of Scotland, and was registered in the Chancery there. Moreover both this grant, and the subsequent confirmatory one abovementioned of the same Province from King Charles the first, dated the 12th July 1625, were ratified and confirmed by an act of the Parliament of Scotland, which will be found in page 70 Vol. 2 of the small copy of the Scots acts: and it was intended to settle this Province from Scotland.^a

The partiality for the name of Nova Scotia is therefore very naturally accounted for without resorting to any other reason for its being devised and adopted by the Sovereign and subject in the formation of this grant.

It is almost superfluous to remark that Sainte Croix is a French

of King James the First to Sir William Alexander, soon communicated itself to the whole country of Acadia, which from that Time frequently passed under both the names of Acadia or Nova Scotia." Memorials of Eng. & Fr. Commissioners—Edit. 1755, London, page 45.

^a Sir William Alexander in a Treatise published by him in London in the year 1624 intitled an encouragement to Colonies page 31 says:—"Having sundry times exactly weighed that which I have already delivered, and being so exceedingly inflamed to do some good in that kind, that I would rather bewray the weakness of my power, than to conceal the greatness of my desire, being much encouraged hereunto by Sir Ferdinando Gorge, and some others of the undertakers for *New England*, I shew them that my Countrymen would never adventure in such an enterprise, unless it were, as there was a *New France*, a *New Spain*, and a *New England*, that they might likewise have a *New Scotland*, and that for that effect, they might have bounds with a correspondency in proportion as others had, with the country whereof it should bear the name which they might hold of their own Crown, and where they might be governed by their own Laws; they wisely considering that either Virginia or New England hath more bounds than all his Majesty's Subjects are able to plant, and that this purpose of mine by breeding a virtuous emulation amongst us would tend much to the advancement of so brave a work, *did yield to my desire, designing the bounds for me in that part which had been questioned by the French*; and leaving the limits thereof to be appointed by his Majesty's pleasure which are expressed in the patent granted unto me under his great Seal of this Kingdom of Scotland, marching upon the West towards the river of *Saint Croix*, now *Tweed* (where the Frenchmen did design their first habitation) with *New England*, and on all other parts it is compassed by the great Ocean, and the great river of Canada, so that tho' sundry other preceding patents are imaginarily limited by the degrees of the Heaven, I think that mine be the first national Patent that ever was clearly bounded within America by particular limits upon the Earth."

name, and that it appears by the grant of the Province of Nova Scotia to Sir W^m Alexander that the river mentioned under that name in that grant as the western boundary of that Province, was so long ago as the year 1621 commonly called and known by the name of the river St. Croix.

Name and River
St. Croix

The natural inference from this circumstance is that at that time, no other river in that part of the Country was known by the same name, or at least that this river was eminently known and distinguished by that name from its superiority in size and consequence to any other of the same name.

It would be easy to shew, and it will not be denied, that in the French and English histories and accounts of this Country, and in the Public transactions, grants, documents and acts of State of both nations, the river St. Croix is very frequently mentioned; that in all these instances one river only has been contemplated and referred to under that name from the time it was first known, as the name of a river, and that one and the same river has since that time been so called and distinguished, and was intended under that name in the Treaty of Peace in 1783; that this name has been as eminently and invariably attached to this river as the names of St. John and St. Lawrence have been attached to the rivers that respectively bear those names, and has been uniformly and universally known as a part of the western boundary of the Province of Nova Scotia since the date of the Patent to Sir William Alexander.

We are to look then to some time prior to the date of this Patent for the origin of this name, and a description of the river to which it was given, as at that time the river, wherever it may be situated, was commonly called and known by that name.

In making this enquiry we have fortunately such marks to steer by, and such minute descriptions to guide us, as are very rarely to be met with in researches of this kind, such as will lead us to infallible certainty in our conclusions, unless the face of nature has been changed, and mountains, bays, rivers, and islands have by some unheard of convulsion been removed or destroyed.

Until the year 1604 we find no mention of the river St. Croix. In that year this name was given to it by the French. The following account of the origin of this name is taken from L'Escarbot's history, and inserted in the memorials of the English and French Commissaries concerning the limits of Nova Scotia, or Acadia, printed in London in the year 1755:

First application of
name to River

^aThe commission of King's Lieutenant-General to the Sieur De Monts is dated 8th November 1603. This is the first document in which we find the word Acadie. The King granted him not only this Country but the borders from the 40th, to the 46th degree of north latitude.

In 1604 the Sieur De Monts sailed with two ships, the one intended to form a settlement within the bounds of his grant, in which he embarked himself with the Sieurs Champlain & Poutrincourt, the other under the command of the Sieur Pont-Gravé, intended principally for the fur Trade.

This last ship sailed to Canseau, and along the coast there to the Isle of Cape Breton, and the first steered a course more westward to the coasts of Acadie.

On the 6th of May 1604 they arrived on the coast of Acadie at Port Rossignol, from thence coasting along the shore they came to another port which they called Port au Mouton. They then reached Cape Sable and sailed for Saint Mary's bay. They weighed anchor to go and examine a great bay which they called the French bay where they found a passage to enter a port which the Sieur De Monts, on account of its beauty called Port Royal, and the Sieur Poutrincourt found this place so agreeable that he requested a grant of it, to retire to it with his family.

Upon leaving Port Royal they went to see the mines, and crossing the bay they arrived at the river St. John on the 24th of June. Quitting afterwards the river St. John they came in following the coast to the entrance of a river where they settled in a small island, which they called St. Croix, and that name was afterwards communicated to the river.

The situation of Sainte-Croix not having been found eligible, they determined to form a new settlement at Port Royal, which was executed in 1605.

A much more particular account and description of this Isle St. Croix in the mouth of the river St. Croix, is given by L'Escarbot, in L'Escarbot's the course of his history, who had been upon the account spot, and viewed the places which he describes:

Leaving St. John's River, they came following the coast at twenty leagues from that place to a great river (which is properly sea) where they encamped on a little island seated in the midst of this river, strong by nature, and of easy defence.^b

After reciting many inconveniences, such as the want of currents and streams of fresh water to drink and for other necessary purposes, the want of wood and shelter from the winds and cold, in a place environed with water on all sides, the account goes on

^a Pages 107-108, Memorials of the English and French Commissaries concerning the limits of Acadia or Nova Scotia, printed in London 1755. [The English text above quoted is a translation presented by Mr. Chipman from the original French.—EDITOR.]

^b B. 4, C. 4, page 445. Vide appendix No. 1. [The appendices are not given.]

. . . nevertheless the company took their station there in the midst of a broad river where the wind from the north and north-west has a full sweep; and because that two leagues higher up there be streams that come cross wise to fall within this wide arm of the sea, the isle in which the French took up their quarters was called Ste. Croix, which is twenty five leagues beyond Port Royal. . . .

Before we speak of the return of the Ships to France, we must observe that the Isle St. Croix is difficult to find for one who has not been there. For there are so many isles and great bays to pass before we come to it, that I wonder how they had the patience to penetrate so far in quest of it. There are three or four mountains eminent above the others, on the sides, but in the northern quarter from whence the river descends, there is only one such. It is of a pointed form, and more than two leagues distant. There are right over against the island fresh water brooks, very pleasant and agreeable where divers of Mons^r: De Monts' men did their business, and built their certain cabins. . . .

The said island is about half a French league in circumference, and at the end towards the sea there is a hillock, and is as it were a separate islet, where Mons^r: De Monts' cannon were placed, there is also a little Chapel built after the savage fashion, at the foot of which there is such store of muscles as is wonderful, which may be gathered at low water, but they are small. . . .

Monsieur De Monts' people worked about the fort which he seated at the end of the island opposite to the place where he had lodged his cannon, which was wisely considered to the end to command the river up and down, but there was an inconvenience, the said fort did lie towards the north, and without any shelter but of the trees that were on the isle shore, which all about he ordered to be kept and not cut down. And out of the same fort were the barracks great & large, and other small lodgings representing as it were a suburb. Some had huddled themselves on the firm land near the brook but within the fort was Mons^r: De Monts' lodging made with very fair and skillful carpentry work, with banners of France upon the same. At another part was the store house, wherein was deposited the safety and life of every one, likewise made fair with carpentry work, and covered with shingles; right over against the said store house were the lodgings and houses of the Sieur D'Anville, Champlain, and Champdoré and other men of note; opposite to Monsieur De Monts' said lodging there was a gallery, covered to exercise themselves, either in play or for the workmen in time of rain. And between the said fort and the platform where lay the cannon, all was full of gardens, wherein every one exercised himself willingly; all autumn quarter was passed on these works, and it was no small matter for them to have lodged themselves, and cleared the island before winter. . . .

During the winter our men had three special inconveniences in this island, viz, want of wood (for that which was in the said isle was spent in buildings), lack of fresh water, and the continual

watch made by night fearing some surprise from the savages that had lodged themselves at the foot of the said island, or some other enemy; when they had need of water or wood they were obliged to cross over the river, which is more than three times as broad on every side as the river Seine at Paris. . . .

Unknown sicknesses assailed us, for remedies there were none to be found—there died of this sickness thirty-six, and thirty-six or forty more recovered in the spring. . . .

The rough season being passed Monsieur De Monts wearied with his bad dwelling at St. Croix, determined to seek out another Port in a warmer country, and more to the south.¹

In a history of the District of Maine by the Agent of the United States in the present discussion published at Boston in the year Seventeen hundred and ninety five, an account of this voyage of the Sieur De Monts is given with some tho' not material variations.

Sullivan's History
of Maine

^a Governour De Motte coasted along the sea shore; and having met with many disasters incident to a navigation where there were no charts to direct; and where the shoals, banks, and harbours, were unexplored; he arrived in the bay, which has since been called Port Royal. From that bay he crossed over to the main land, into a great river about twenty five leagues west from the bay, which they called St. Croix. This name was given to the river, and the country on its banks, because De Motte erected a cross fifty feet high on his landing.

The next year the Island St. Croix, which was situated at the mouth of the river of that name was abandoned by the French and their capitol was removed to the East side of the Bay of Fundy and placed at Port Royal.

These accounts contain probably as particular and accurate a description of the Isle Ste. Croix and mouth of the river St. Croix, as is to be found in any history, voyages, or travels ancient or modern of any particular spot or place upon Earth, and if the accounts are not fabulous, which upon examination it will appear clear to a demonstration they are not, and if the face of nature remains the same in this part of the world there can be no difficulty in discovering this Isle and river St. Croix.

Let any one with the foregoing descriptions in his hand go to the small Island in the mouth or entrance of the river Scoudiac, a few miles above the town of Saint Andrews, and he will at once recognize every feature in the picture, he must be forcibly struck with the accuracy and fidelity of

Identification of
St. Croix Island
with descriptions

¹ The foregoing text is an English version presented by Mr. Chipman. For the original French, see Lescarbot, B. 4, pp. 445-85.—EDITOR.

^a Sullivan's History, page 55.

these historians, and feel a conviction that should he at this day attempt to describe this Island from the appearance of the surrounding country and its situation, and particularities in every respect, except what may be easily accounted for by gradual waste from the surrounding currents of the tide, it could not be done more accurately than in the words made use of in these descriptions. There are the mountains eminent above the others, on the shores, on the sides, but on the North there is but one which appears to be about two leagues distant, whence the river descends from the next adjoining reach. This is a sharp pointed one, and is now commonly called the Devil's Head, a corruption probably of the word D'Orvillis, and forms the Southern side of the entrance of the abovementioned reach of the river, running from the Westward: At the Seaward end of and a little below the Island are the rocks, within or upon which stood the hillock or separate Islet on the West side of the Island; there is also now to be seen at low water such store of muscles as is really wonderful, and of a kind peculiarly small. Right over against the principal Island, there is a remarkable fresh water brook, which from its appearance must have been always there, and there are other fresh water brooks also along the shore as described by L'Escarbot.

The spot where the Fort is described to have been, looks to the North, and commands the river up and down.

There is no fresh water upon the Island, and the breadth of the river on each side is such as it is described to be.

The Island is in the middle of the river, and is particularly exposed to the North and Northwest wind.

As all the members of this honorable Board, have together with the Agents, viewed the premises in question, and if there are any errors in this statement of their appearance and situation will discover and reject them, the underwritten Agent has taken the liberty to be thus particular in making it, and he flatters himself, that he will be able to demonstrate this Isle and river, to be the Isle and river originally called St. Croix by the Sieur De Monts.

To proceed in comparing them with the descriptions of L'Escarbot. "Leaving St. John's river they came following the coast from that place to a great river, which is properly called sea." The river Scou-diac^a is by far the largest river, between the Penobscot & St. John's, and from its width at the mouth, may properly be called Sea, or a branch of the Sea, as the salt water flowing from a bay on the Sea

^a A river, which the natives called the Mackagadawick, is found on the north side of Passamaquaddy Bay, twelve miles north east & by north from the mouth of the Schooduck. This is much less than the river last mentioned. Sullivan's History, page 41.

coast into the mouth of a wide river where the tide is received, is not unfrequently called, but in the present instance the term is peculiarly appropriate, as the Isle St. Croix in the mouth of this great river is exposed to the full sweep and force of the tide and Sea, from the bottom of that part of Passamaquady, now called St. Andrew's Bay. "Where they fortified themselves in a little Island seated in the midst of this river strong by nature and easy of defence." This description is remarkably just and correct, and will apply to no other Island and river in that part of the Country.

Nevertheless the company took their Station there in the midst of a broad river where the wind from the north & northwest has a full sweep, and because that two leagues higher up there be streams that come cross wise to fall within this wide arm of the sea, the isle on which the French took up their quarters was called Ste-Croix twenty five leagues distant from Port Royal.

Here a reason is given for the name of St. Croix which will apply to the river Scoudiac, and to no other river in that part of the country; we have seen that the sharp pointed mountain on the North side of the Island was estimated to be about two leagues distant from the Island; at the foot of that mountain the river runs down from the West as before observed, and "falls within this wide arm of the Sea"; almost opposite to this the Waghweig river or stream comes cross wise from the East into this said arm, and together with the head of this arm into which a stream runs from the Northward forms the figure of a cross, as may be seen by inspecting the plan formed under the direction of the Board, and gives propriety to the name, if it did in fact originate from this circumstance.^a

Before we speak of the return of the ships to France, we must observe that the Isle St. Croix is difficult to find for one who has not been there. For there are so many isles and great bays to pass before we come to it, that I wonder how they had patience to penetrate so far in quest of it.

Let any one set out as these voyagers did from the river Saint John, and follow the coast till it comes to this Isle of Saint Croix, and he will be struck with the peculiar propriety of this part of the description. After passing the river Musquash, a very considerable river about twelve miles west from St. John's river, you come to Point or Cape Le Proee, you then pass Mace's Bay, a deep bay formed by this Cape to the Eastward in which are several small Islands, and into which Le Proee empties itself; near to this as you go on westward, you come to Beaver harbour or

Appropriateness of the descriptions

^a Vide Map No. 1. [See *infra*.]

bay, leaving the Wolves so called, which consist of four principal and some smaller Islands, and Grand Menan Island, on the left, and soon get into a cluster of very fine Islands, almost innumerable of different intermediate magnitudes from that of Passamaquoddy or Campo Bello Island to the most diminutive size, all lying in Passamaquoddy Bay; these Islands you pass viewing them in their delightful varying prospects, and at length by the Eastern or Le Tete passage, enter a large bay being that part of the Passamaquoddy Bay, now called St^t Andrew's Bay, which is ten or twelve leagues in circumference, and about three leagues over. Still you see nothing of the Isle of St. Croix. After entering this bay, you pass on by the mouth of the Magaguadavic river, in or near to which there is no Island of any kind, and without perceiving there is a river there, on account of the peculiar manner in which the entrance of it is formed, unless it be discovered or suspected by the setting of the tide in going near to it. Three or four miles north west of this river, you pass the mouth of the river Degedeguash, or Deckwessit in and near which are several small Islands, one of which called Hog Island, about half a League in circumference, the Agent on the part of the United States pointed out for the view of this honorable Board as the Isle St. Croix of De Monts; this Island lies directly opposite Le Tete passage, through which you have a direct view from it into the Bay of Fundy. You then pass the mouth of the river Bockabeck, Chamcook Island, and some other small Islands, and passing St. Andrew's Point, leaving St. Andrew's Island on the left, enter the harbour of St. Andrew's. Still you have not penetrated far enough to see the Isle Ste. Croix. In proceeding from St. Andrew's harbour, and turning the northern point of it commonly called Joe's point you have a full view of the mouth of the great river Scoudiac which at this place is two miles wide; about a league further on, and in the middle of this great river you at length come to the Isle St. Croix, and another Island much smaller a short distance below or Seaward, lying near to the western shore. This arm of the Sea forming the mouth of the river Scoudiac, extends about two leagues further Northward, & terminates in a bay called Oak Point Bay, in which there are two Islands, one low, the other so high as to be clearly seen and distinguished from the Isle St. Croix. Beyond this are no bays or Islands; beyond this you cannot penetrate by water, but by going up this river Scoudiac or Ste. Croix, the Waghweig, coming cross-wise from the Eastward, being but an inconsiderable stream, and there being only one other similar stream coming from the Northward into Oak Point Bay.

In searching for the Isle Ste. Croix with L'Escarbot's description in

his hand, would any man doubt that here was a successful termination of his Labours. Would he not exclaim—I will go no further.

The foregoing sketch of the route from St. John's river to the Isle and river of St. Croix will be seen to be correct from an inspection of the maps now before the Board; and it will admit of no doubt that this Island in the mouth of the river Scoudiac is the Isle Ste. Croix mentioned by L'Escarbot, when we attend to the delineation of the river St. Croix, in the map annexed to his history now before the Board, a copy of which is herewith presented. In this map only one river is laid down, between the river St. John, and the river Norembega or Penobscot, and is marked St. Croix; in this river the Isle St. Croix, and the smaller Islands near the western shore, are laid down exactly in the relative situation in which we find the Island in the middle of the Scoudiac to be placed, and in the Northern quarter we see the sharp pointed hill laid down, answering the position, in which the Devil's, or D'Orvilles Head is found to lie.^a

In addition to the foregoing remarks upon L'Escarbot's map it is proper to observe here:

1st. That only one river was at that day contemplated under the name of St. Croix river.

2^d. That this is a large river, and the only one laid down as emptying into the bay now called Passamaquoddy Bay.

3^d. That this river has a branch extending westward, towards the eastern branch of the river Norembega, and called Penobscot.

As this point is of so much consequence the underwritten Agent requests to be indulged with transcribing in this place, the description of the same route from the history written by Champlain, who as we have seen accompanied the Sieur De Monts at the time this Isle and river St. Croix received this name.

Account of
Champlain

^b From the river St. John we were at four Islands on one of which we landed, ^c and there found a great quantity of birds called Margos, of which we took abundance of young ones, which are as good as young pigeons. The Sieur Poutrincourt was near losing himself there, but at length he returned to our bark, as we were going in search of him round the Island, which is distant about three leagues from the land. More westerly there are other Islands, and among

^a Vide map No. 2.
^b Champlain B. 2, C. 3, edit. 1613. Vide appendix No. 2. [The appendices are not given. The original French of these passages is found in Champlain, Book 1, Chapters 3 and 4. See Laverdière, Vol. 3, pp. 23-8, and Biggar, Vol. 1, pp. 268-78.—EDITOR.]

^c These are the Islands now called the Wolves.

them one containing six leagues, which the Indians call Manthane,^a to the south of which there are among the Islands many good harbours for vessels. From the Margos Isles, we went to a river in the main land which is called the river of the Etchemins, a nation of Savages so called in their country, and we passed by so great a quantity of Islands, that we were not able to ascertain the number; they were pleasant enough, containing some two Leagues, some three, and others more or less. All these Islands are in a cul-de-sac, which contains in my judgment more than fifteen leagues in circumference, and in which there are many convenient places for anchoring as many vessels as you please, and which in their season abound in fish, such as Cod, Salmon, Bass, Herrings, Haitans, and other fish in great numbers. Going west Northwest three leagues by the Isles we entered a river, which has near half a League in width at its mouth, in which having gone a League or two, we found there two Islands, the one very small near to the western shore, and the other in the middle, which may have eight or nine hundred paces in circumference, of which the banks are every where of rocks, three or four toises high, except a small place where is a point of sand and clay, which may serve for making bricks and other necessary purposes. There is another sheltered place where vessels of eighty or an hundred Tons might lie, but it is dry at low water. The Isle is full of firs, birches, maples, and oaks. In itself it is a very good situation, and there is but one side where it slopes about forty paces, which is easy to fortify; the shores of the mainland, on each side being distant about nine hundred, or a thousand paces, vessels cannot pass upon the river, but at the mercy of the cannon of this Isle, which is the place that we judged the best as well for its situation, and the goodness of the country as for the communication which we proposed to have with the savages of this coast, and of the interior country, being in the midst of them; whom we hope in process of time to civilize, and to extinguish the wars, which they have among themselves, and to derive advantage from them in future, and to reduce them to the Christian faith. This place was named by the Sieur De Monts, L'Isle Sainte Croix.

Passing further on you see a great bay, in which there are two Islands, one high, and the other flat, & three rivers two of a middling size, one going Eastward, the other to the North, and the third a great one, which goes to the West, and is that of the Etchemins of which we have spoken above; on going up this river two Leagues, there is a fall of water where the Savages carry their Canoes over land, about five hundred paces; they then re-enter the river from which afterwards by crossing a little land they go into the river Norembugue (Penobscot) and Saint John.

In this place of the fall where vessels cannot pass on account of the rocks, and because there is but four or five feet of water in May and June, there is taken so great a quantity of herrings and bass, that vessels might be laden with them. The land is very fine, and there are about fifteen or twenty arpens of land cleared where the

^a In the edition of 1632, B. 2, C. 2, p. 58, this Island is called Menane.

Sieur De Monts caused some wheat to be sown, which grew very well.

The Savages retire there sometimes five or six weeks during the Fishery. The rest of the country is covered with thick Forests; if the lands were cleared, grain would grow there very well. This place is in the Latitude of Forty five degrees, and one third, with seventeen degrees, thirty two minutes variation of the needle.

Not having found a fitter place than this Island we began to make a barricade upon a small Islet, a little separated from the Island which served as a platform for placing our cannon; every one exerted himself with such good will that in a little while it was made defensible; altho the mosquitoes, which are little flies, incommoded us very much in our work, for there were several of our people, whose faces were so swelled by their stings, that they could scarcely see. The barricade being finished, the Sieur De Monts sent his bark to direct the rest of our people, who were with our ship at Saint Mary's bay to come to Saint Croix, which was soon executed; and while we waited for them, we passed our time pleasantly enough.

Some days after, our vessels being arrived and anchored every one landed; then without loss of time the Sieur De Monts began to employ the workmen to build houses for our dwelling, and permitted me to give directions for our lodgings, &c.

After finishing the buildings we made some garden spots as well upon the main land as in the Island, in which we sowed several sorts of grain, which grew very well, except upon the Island, which being only sand, every thing was burnt, where exposed to the heat of the sun, altho' they took great pains to water them.

Upon this description from Champlain it is proper to remark that it appears from the surveys that have been made, the plans of which are now before this honorable Board, that the course from the Eastern, or Le Tete passage into St. Andrew's bay to the mouth of the Scoudiac river at Joe's Point, is west North-west,^a that the distance is very nearly if not exactly three French Leagues, and that the entrance of the river at that place is about two miles wide; that going up the river from thence about four miles, there are two Islands, one of them a very small one, near the Western shore, and the other in the middle of the river; which is between eight or nine hundred yards or paces in circumference; that the bank is about thirty feet high all round of steep rocks, except a slope of about forty paces, facing the western shore, which is easy to fortify, and a little at the bottom of the Island, where there is a point remarkable for a bed of clay, covered with sand, which sand is now used in building by the inhabitants of St.

^a The variation of the needle when Champlain wrote was Westerly 17° 32'; in August 1787, it was 13° 27' West and is now 12° 19. 30 West.

Identification of
River Schoodiac
with St. Croix

Andrews, and the neighbouring country; that the coasts of the main land, on both sides the Island are about one thousand paces distant, and it is obvious that ships must have passed the Island at the mercy of the Cannon.

From the plans of the Surveys it also appears, that above St. Croix Island in Oak Point bay, there are two Islands, one high and the other flat, that there are three rivers or streams, two of them small, one called Waghweig going Eastward, the other going to the North, and the third which is a great one, going to the West, which is the river Scoudiac or St. Croix called by Champlain the river Etchemins; that on going up the river two leagues, there is a fall of water where the Indians at this day carry their canoes; that re-entering the river above this portage, there are two branches that form the main river Scoudiac; running from the Westward^a there is a portage to a branch of the Penobscot, and from the North branch of the Scoudiac or Cheputnatecook river to the river St. John.

It is also remarkable that at the foot of the above mentioned fall in the river Scoudiac a greater quantity of herrings and shad is to this day caught in the middle of the months of May & June annually, than in any other place upon this part of the Coast; that only the Inhabitants of that part of the Country obtain here an annual supply of fish for their families of several barrels each, but that there are commonly taken and cured for exportation between two and three thousand barrels annually, and many more might be taken if proper preparations were made for the purpose, as it is a very small proportion of the fish that is intercepted here, by far the greatest^b part of them going up the rapids into the rivers and lakes, to discharge their spawn.

It is hoped it will not be deemed impertinent to observe here that there is no such fishery in the river Magaguadavic probably because the great fall of water near its entrance is so impetuous that the fish cannot ascend it, for it is a common observation that these fish do not resort, except in small numbers, to the mouth of any river which they cannot go into with their spawn: The inhabitants settled upon the river Magaguadavic therefore go annually to the river Scoudiac for their supplies of fish.

It is further to be observed upon the foregoing description from

^a "On the north west angle of this [Passamaquady] bay, the River Schooduck finds the general receptacle, and extends westerly a great way into the country. Two hundred miles from its mouth, as its courses are, that river comes within one mile of the east branch of Penobscott, where there was an Indian carrying place, from the one to the other." Sullivan's History, p. 40.

^b Vide Depositions of Alexander Hodges, John Curry and others in the appendix. [The appendices are not given.]

Champlain, that the Land surrounding the river Scoudiac is very good, that there is an ancient clearance near the falls, which is called the Indian field, which, it is not improbable, was the cleared ground there mentioned by Champlain; and that this river is known to have been the great channel of communication of the Indians from the Penobscot & other places, to the westward from Machias river and the river St. John.^a

And it is also remarkable that the Island in the middle of the Scoudiac, further answers Champlain's description of the Isle St. Croix by having a soil consisting, almost entirely, if not altogether of a body of sand.

Champlain immediately after his description of the river of the Etchemins, begins his next chapter by calling it the river St. Croix.^b

But to complete this article [of] evidence and dispel every doubt from the most incredulous mind, we have the plan of this Isle St. Croix

made by Champlain himself upon the spot, a copy of which is now before the Board in which that Island, the small Island near the Western shore, the surrounding rocks, the adjacent shores of the river, the brooks and places where the gardens were made upon those shores, the soundings in the river, and other particulars, are minutely laid down; all of which correspond with the Island in the mouth of the Scoudiac, and the adjacent shores as they appear at this day with a degree of accuracy, by no means to have been expected, considering the alterations naturally to be supposed from the ravages of time and the waste from the surrounding tides and currents, during a period of nearly two hundred years.

By comparing this plan sketched by Champlain, with a plan of the Island in the mouth of the Scoudiac, and the adjacent shores, recently taken, and now before the Board, we shall not [only] be convinced of the identity of the places represented in them, but shall form the most favourable ideas of M^r Champlain's abilities and accuracy in this line, if done by him, or of the person employed by him for the purpose.^c

^a Rivière des Etchemins, par où les Sauvages vont à Quinebequi, traversant les terres avec difficulté pour y avoir des Saults et peu d'eau, le sieur de Champlain en 1628 fit faire cette découverte et fut trouvé une nation de Sauvage à sept journées de Québec qui cultivent la terre appelée les Abenaquinoit. Champ. edit. 1632, in Table at the end.

^b De ladite rivière de Sainte Croix continuant le long de la côte faisant environ 25 lieues passâmes par une grande quantité d'isles, bancs, battures, et rochers, qui jettent plus de 4 lieues à la mer par endroits, que je nommay les isles rangées, la plus-part desquelles sont couvertes de pins et sapins, et autres meschans bois. Champ. edit. 1632, B. 2, C. 3, p. 61.

^c Vide maps N^o 3 and 4.



Les chiffres marquent les hautes Croix.

- | | | | |
|---|---|--|--|
| <p>A Le plan de l'habitation.
 B Les langues.
 C L'Etat des terres de platte terre.
 D Platte terre ou est habitée du côté du Nord.</p> | <p>E Le cimetière.
 F La chapelle.
 G Bâties de bois autour de l'île.
 H Un petit îlet.
 I Le lieu où le fleur de Mont au dit</p> | <p>J Les commences en bois, à eau.
 K Place ou l'on vend du charbon de terre.
 L Les bagages à la grande terre.
 M Un petit îlet.
 N Autres habitages à la grande terre.</p> | <p>O Grande montagne fort haute dans l'île.
 P Ruine des Eschevins jadis au tour de l'île, l'île de Croix.</p> |
|---|---|--|--|

p. 171

Champlain's map of Isle de Sainte Croix.
 (In his "Voyages," Paris, 1613.)

This plan and the description of it by Champlain serve also incontestibly to prove that L'Escarbot in his History speaks of the same Island and river as the Isle and river Ste. Croix.

Could any doubt be entertained after the light thrown upon the subject by L'Escarbot, the foregoing account and plan furnished by Champlain amount to full and complete demonstration, that this Isle in the mouth of the Scoudiac is the true ancient Isle Ste. Croix, named by De Monts and upon which he passed the winter 1604, and consequently that the river Scoudiac, is the true ancient river St. Croix.

It is proper to observe here that L'Escarbot, was not with the Sieurs De Monts and Champlain in 1604, that after wintering upon the Isle St. Croix, the settlement upon it was abandoned in 1605 & that L'Escarbot never lived upon the Island, though he afterwards visited it, which will account for Champlain's greater accuracy and exactness with respect to the size of the Island, distances, and other particulars as he passed the winter upon the Island with De Monts.^a

Before any other authorities upon this point are proceeded to, it may not be improper to remark here, that the account of the first discovery of the Isle and river St. Croix, already extracted from the history of the District of Maine, remarkably confirms the fact that the river Scoudiac was the river then called the St. Croix.

The little variations of *De Motte* for *De Monts*, and the circumstance of the name being given to the river and the country on its banks, because De Motte erected a cross fifty feet high on his landing, are the strongest proofs of the authenticity of the other accounts; as this must have been the relation of some different author and shews there was no concert or combination between them to palm upon the world a fictitious story. The leading facts are the same.^b That De Motte obtained a Commission from the King of France in 1603, that after his arrival in America, which by mistake is supposed to be the same instead of the following year,^c "he crossed over [from Port Royal] to the main land, into a great river, about twenty five leagues west from the bay, which they called St. Croix." "That the next year the Island of St. Croix, which was situated at the mouth of the river of that name, was abandoned, by the French, and their capital was removed to the east side of the bay of Fundy, and placed at Port Royal."

^a "L'Escarbot, que le Sieur de Poittrincourt amena avec lui en Amérique, à son second voyage en 1606, a fait l'histoire de ces premiers établissemens. En 1606, le Sieur de Poittrincourt, après avoir laissé l'Escarbot à Port-royal, pour suivre tous les travaux de l'habitation, visita de nouveau ces côtes." Mem. Eng. & Fr. Com. p. 107-8.

^b P. 54.

^c Pp. 55-56.

As it will hereafter appear that a cross was erected upon the Banks of the Scoudiac upon Indian or St Andrew's Point, which as it became defective was occasionally renewed, and remained standing at the peace in 1783, there can be little doubt that the original cross placed here was the one erected by De Motte or De Mons in 1604.

There is another very respectable authority upon the point, now under consideration^a in a book published, in the Dutch Language at

^a In book 2, C. 18, entitled a further description of the, "places havens and rivers, lying in the great *baye François*e, & beyond it to the river Pentagoet &c, after describing the Coast as far westward as the western point at the mouth of the *Rivière St. Jean* he proceeds: From thence you come to four Islands which are full of birds, & farther westward still to other Islands, & one among them six leagues great called by the Indians Manthane, & to the Southward of this Island there are several good harbours in between the Islands; From these you come to a river in the mainland which is called *Rivière des Etchemins*, after the Nation who dwell about there; you pass thro' innumerable Islands, which lay as it were in a sack, some of them a league great more or less. Champlain calls them in his chart *Isles jumelles*. In between these Islands you come to a river in the middle of which lays Isle St. Croix, where the French had an habitation, which they afterwards left, as is to be seen by Champlain and L'Escarbot. This Island lies in forty five Degrees, & one third North Latitude and the compass varies North-west there Seventeen degrees & thirty two minutes. From this Island you come to a bay into which three rivers come, the one from the East, the other from the North, & the third from the West, which is the one we have before called *Rivière des Etchemins*, and two leagues up the river there is a great fall, so that the Indians must carry their canoes, as much as five hundred paces overland. In this river a great quantity of herring is caught in the months of May and June; it is a very good soil & corn would grow there if the wood was cut away, for the whole land is most of it full of wood, and on the Island and thereabouts there is no want of mosquitoes."

To go from this river de St Croix to the river Pemtangoet or Norembegue you pass thro' a great number of Islands, Rocks, and Shoals, and the Island which the Indians called Menane lies three leagues from the main land &c.

In the same book Chap 24 entitled, "Farther proceedings of the French in several other quarters of Nova Francia & especially on the South coast at Saint Croix and Port Royal," after speaking of De Monts having obtained a new charter from the King of France of all the lands lying between the fortieth & forty sixth degrees of North Latitude he proceeds:

"Hereupon the said Sieur DeMonts fitted out two ships and took with him one hundred and twenty family persons and departed from France the 7th of April 1604 & in his voyage passing by Isle de Sable, & the Coast of Cadie or Acadie, took up his habitation in Port au Mouton, which he shortly afterwards left, & after he had visited Le Baye St Marie, set himself down on the Island Saint Croix, lying at the mouth of the Etchemins in the latitude of forty five degrees & one third where they wintered, & out of seventy nine persons, thirty five were lost by different kinds of sicknesses. In June 1605, a fresh supply of people came to him from France, and after they sought for a fitter place to dwell to the Southward, for the winter was found here incomparably colder than in France, & had been so far as into Port de Malebare and not having found any to their satisfaction, they left their habitation at Saint Croix and transferred it to Port Royal, where he planted five & thirty men and returned himself to France, &c^a" [This is a fair translation of the original Dutch text as found in the "*Nieuwe wereldt ofte Beschrijvinghe van West-Indien, wt veelderhande schriften ende aen-tekeningen van verscheyden natien by een versamelt door Ioannes de Laet, ende met noodighe kaerten ende tafels voorsien. Tot Leyden. Elzevier, 1625.*" A copy of this work is in the New York Public Library.—EDITOR.]

By the bare perusal of this extract from De Laet the remarks that have been made upon Champlain's account of the same transactions must naturally occur; it would be therefore tedious and unnecessary to repeat them.

Leyden in 1625, by Ioannes De Laet, entitled New World or description of the West Indies collected from sundry writings and testimonials of different nations, which ^{De Laet and other authorities} confirms in the fullest manner the inferences drawn from the preceding authorities.

Let it then be asked: Is it within the compass of human contingencies, that a river and an Island, corresponding with ancient, authentic, historical accounts and descriptions thereof in the manner that the river Scoudiac and the Island in its mouth are found to correspond with above recited historical accounts and descriptions of the Isle and river St. Croix, should not be the same?

It being presumed that the Isle and river St. Croix originally so called by De Monts are now ascertained beyond all contradiction to be the river Scoudiac and the Island in its mouth; the next object is to shew that this Isle & river so ^{Public grants and other documents} first called by De Monts, are the same that have been since that time referred to under that name, not only in the public grants and other national and authentic documents both of the English and French Governments, but by all the historians of either Nation who have had occasion to speak of the territory in question.

This is so evident from the history of this Country, that it may appear strange that any pains are taken, or that it should be thought in any degree necessary to bring forward upon this occasion the proof every where to be found in support of it, but as these proofs are called for by the Agent of the United States, some of the most important, out of a long series of uniform and clear authorities to the same point, are here submitted to this honorable Board.

Tho' a laborious, it will be no difficult task to trace the name of the Isle and river St. Croix from the time it was originally given by the Sieur De Monts, down to the Treaty of Peace in 1783, as referring to the same Isle and river so originally named by him.

Champlain who has so particularly described the Isle St. Croix, so called by De Monts in 1604 tells us Sieur Saussaye^a had begun a settlement at the river Pentagoet upon the coast of the Etchemins; that the English from Virginia under the orders of Captain Argall attacked and destroyed it in 1613, that they demolished likewise the buildings which were at St. Croix, pillaged Port Royal, and carried away part of the Inhabitants.^b

^a Memo. of Eng. & French Com. p. 111; Champ. Pt. 1, pp. 104 to 109.

^b Charlevoix in speaking of the same transaction says, "puis il alla à l'Isle de Sainte Croix, où il ruina tout ce qui y restoit de l'ancienne habitation de De Monts: il fit la même chose au Port Royal," &c.

In a representation made by the President of the Council of New Plymouth^a in 1622, addressed to Charles 1st, speaking of the same transaction, they say, Sir Samuel Argall, "having seized the Fort which the French had constructed at Mount Mansell, [now Mount Desert] at Sainte Croix & Port royal, he bro't off the Cannon" &c^a.

In May 1632 after Acadie was ceded to the French by the Treaty of Saint Germain, a grant was made to the Sieur Razilly,^b Lieu^t

Grant to Sieur Razilly	General for the King in New France, of the following extent of land and country, to wit, "the river & bay Sainte Croix, the Islands therein contained, & lands adjacent on either side in New France, extending twelve leagues in breadth, taking the middle point in the Isle Sainte Croix, where the Sieur De Monts wintered and twenty leagues in depth from Clam Cove or harbour, which is in one of the Islands, at the entrance of the river and bay Sainte Croix, each league being of four thousand toises in length."
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It will not be improper in this place to attend particularly to the boundaries of this grant, as there are such data in it, as will enable us to protract the lines of it upon the plan of the surveys now before the Board. Clam Cove, or harbour is a well known place on the westerly side of Deer Island, at the mouth of the bay of St. Croix (now called Saint Andrew's Bay). Let a line then be drawn from this cove through the Isle St. Croix in the mouth of the Scoudiac as the middle point of the grant, which must be in the Isle St. Croix where De Monts wintered; let this line be extended twenty leagues from the cove in depth into the country, and we shall have the centre line of the grant, being an oblong whose width is twelve leagues, and whose depth is twenty leagues,—let the other lines of the grant be then extended accordingly, and we shall find the lower and or [*sic*] Southern line of the grant will range nearly along the North, or North-west shore of Deer Island, and cross the Le Tete passage, so as just to include the bay, and the lands adjacent on either side, to the extent mentioned in the grant. The lines will have such a direction as to include the river St. Croix or Scoudiac a considerable distance westward of the conflux of the Cheputnatekook with the St. Croix, and give just the tract described in the grant.

Here it is evident that the Isle St. Croix must be within or to the Northward of Clam Cove, and pass thro' the Isle St. Croix as a middle point; and if the Isle St. Croix should lie to the Southward of the cove, the grant instead of comprehending land would be an oblong

^a Memo. of Eng. & Fr. Com. p. 112.

^b Id. 117, 707.

of twenty by twelve leagues in the Bay of Fundy or Atlantic Ocean.

Let any other Isle be taken than the true Isle St. Croix in the mouth of the Scoudiac for the middle point of the breadth, in the protraction of this grant, and it will be obvious that the lines will never include the territory, intended to be granted.

In fact the unanswerable argument, to be drawn from the boundaries of [the] grant, would alone be sufficient to establish incontrovertibly the fact, that the river Scoudiac, and the Island in its mouth, must be the river and Isle St. Croix, so named by De Monts in 1604 upon which Isle he wintered that year.

But to proceed to the point now under consideration—it appears from the foregoing extracts, that the St. Croix of the French in 1613 and 1632 is the same St. Croix, that was named by De Monts in 1604, and that this same St. Croix, was the St. Croix of the English in 1622, and it appears by the account given by Sir W^m Alexander himself, in his treatise entitled, “An encouragement to Colonies,” published in London in the year 1624, that the same river St. Croix was contemplated in his grant in the year 1621.^a Accordingly the French

^a “Monsieur De Monts, procuring a Patent from Henry the fourth of Canada from the 40th degree Eastward, comprehending all the bounds that is now both within New England and New Scotland (after that Queen Elizabeth had formerly given one thereof as belonging to this Crown by Chabot's discoverie) did set forth with a hundred persons fitted for a plantation, carried in two Ships of small burthen, which parting from France on several days did appoint their meeting at the Port of Campseau, but the ship wherein Mons^r De Monts had placed himself going first, and fearing the huge mountains of Ice that dissolving from the far Northern parts come along the coasts of Newfoundland during the Spring time, did take her course more to the South, and arrived at Port de Mouton, a bay now in the foreland of New Scotland from whence one of the Natives of the Country, (either out of courtesie, or to gain a reward) leaving his wife and children (as a pledge, or else to be nourished with them) went to Campseau, and within a week brought them news from their other ship that had arrived there, which coming to them, and Mons^r Champlain who had gone in a Shallop to discover the Coast, being returned, they sailed together westward to Cape Sable, and from thence Northward to bay Saint Marie's, where towards the South side thereof they found good meadows and arable ground fit to be planted upon, and towards the North a mountainous, and mineral bounds, having discovered one vein of metal that did hold silver, and two of Iron stone. After this, having seen Port Royal, they went to the River called by them the Sante Croix, but more fit now to be called Tweede, because it doth divide New England and New Scotland, bounding the one of them upon the East and the other upon the West side thereof; here they made choice of an Isle, that is within the middle of the same, where to Winter, building Houses sufficient to lodge their number. There, besides other sorts of wood, they had store of cedar trees, and found the ground very fertile, as it did prove afterwards, bringing forth that which they did sow with an extraordinary increase, yet during the winter time when they could not conveniently go to the main land, they found it very inconvenient dwelling, specially for want of fresh springs: and the soil being of itself humid, and obnoxious to waters, they had not been so industrious as to cast a ditch, wherewith to dry the ground, whereupon their houses stood; and in the end finding that a little Isle was but a kind of large prison, they resolved to return unto Port Royal, whereof I will give a particular description, because it was the place of

Commissaries in their memorial above referred to expressly say that the names assigned in the Charter of Sir William Alexander, exactly agree with the descriptions of the same countries, by Denys, Champlain and L'Escarbot.^a

But words are very needlessly multiplied to establish this point, when throughout the discussions between the English and French

Discussions between English and French Commissaries, 1750-1753

Commissaries from the year 1750 to 1753, concerning the limits of Nova Scotia, or Acadia, it is considered as a fact, as well known and established, as any circumstance in the history of that country, that the

river St. Croix, originally named by De Monts, is the same that was ever afterwards referred to under that name by the English and French Nations, and that one, and the same, and but one river was contemplated under that name, as the western boundary of the Province of Nova Scotia. And to this effect are the numerous references to the river St. Croix in the histories, grants maps, and public documents, both French and English there cited, as may be seen by recurring to the printed memorials of those Commissaries.

The English Commissaries after observing that the limits of the country to the westward specified in the grants to Sir William Alexander, terminate at the river St. Croix, add ^b—"That the limits could not be further extended on that Side by these letters Patents; because all the Country to the Westward of the river St. Croix, had, in the year 1620, before the Date of the first of them, been granted by King James to certain of his Subjects, by the Name of the Council of Plymouth, of which Grantees Sir William Alexander was one, and who, by Virtue of an Agreement among the said Grantees, possessed the Country lying between the River St. Croix and Pemaquid, a little to the Westward of Pentagoet."^c

their residence, as I intend it to be for the chief Colony of the Scottish Nation, grounding that which I am to deliver upon such discourses as the Frenchmen have written, and upon that which I have heard reported from sundry others who have seen the same." Page 16 to p. 18. [This has been made textually to conform to the original print, but the archaic spelling in the latter has not been substituted for the later spelling in the State Department copy.—EDITOR.]

^a Page 213. "Les noms que la charte désigne, se concilient entièrement avec les descriptions de ces mêmes pays par Denys, Champlain et l'Escarbot."

^b Page 43.

^c Purchas gives the following account of Sir William Alexander's Patent. "Sir Ferdinando Gorge [*sic*], being entrusted with the affairs of New England, after he had advised with some of the Company; considering the largeness of the bounds intended to be planted by his Majesty's subjects in America, and the slow progress of Plantations in these parts, that the Scottish Nation may be persuaded to embark themselves in their foreign enterprise; he was content that Sir William Alexander Knight, one of his Majestys most Honorable Privy Council of that Kingdom, should procure a Patent of such a bounds as his Majesty should appoint to be called New Scotland, and to be held of the Crown of

Agreeably to this account, Governor Hutchinson in his History^a tells us that two of the members of this Council

Sir Ferdinando Gorges and Capt. Mason, having been at more expence and taken more pains than any other members of the grand council of Plymouth, and perceiving no prospect of any equivalent return, and fearing from the great clamour in the nation against monopolies that they should e'er long be forced to resign up their grand charter, they entered this year [1635] upon a new project, viz., to procure a general governor for the whole country of New-England to be forthwith sent over, and because the Massachusetts charter stood in their way they endeavoured a revocation of it, that so the whole [country of New England] from St. Croix to Maryland might be brought under the same form of government.

The following is taken from Hazard's Historical collections, Vol. 1. p. 387.

Gorges Description of New-England. Captain John Mason was himself a man of action, and had been some time Governour of a Plantation in Newfoundland, his time being expired there he returned into England, where he met with Sir William Alexander, who was Master of Requests to his majesty for the realm of Scotland, but since Earl of Stirling, who hearing of Captain Mason's late coming out of Newfoundland was desirous to be acquainted with him. To that end he invited him to his house, and after he had throughly informed himself of the state of that Country, he declared his affection to that plantation, and wished the Captain to be a means to procure him a Grant of the Planters thereof for a portion of land with them, who effected what he desired. The Captain understanding how far forth I had proceeded in the business of New-England, advised him to deal with me for a part of what we might conveniently spare, without our prejudice within the bounds of our Grant. Sir William Alexander intending to make himself sure of his purpose, procured his Majesty, (for what could they not do in those times in such cases) to send to me to assign him a part of our Territories, his Majesty's gracious message was to me, as a command agreeing with his pleasure, to have it so. Whereupon an instrument was presently drawn for the bounding thereof, which was to be called New-Scotland, which afterwards was granted to him by the King, under the seal of Scotland. Thus much I thought fit to insert by the way, that posterity might know the ground, from whence businesses of that nature had their original.¹

Scotland and governed by the Laws of that Kingdom, as his said Patent, containing all the bounds, that doth lie to the East of Saint Croix, compassed with the great River of Canada on the North, and the Main Ocean on the South, doth more particularly bear." Purchas, 4 Vol. Lib. 10, C. 6, p. 1872.

^a Vol 1, page 48.

¹ This passage, as taken from the State Department copy, literally agrees, save in spelling, with the original, except that the latter says, "in the New-foundland," "Mr. of Requests," and "Earl of Starline."—EDITOR.

In 1621 the Council of New England resigned to the Crown all parts of their grant to the Northward of the river Saint Croix when it was then granted with the rest of Acadia to Sir William Alexander, Secretary of State for Scotland, and called New Scotland.¹

The whole was proposed to be divided into Twelve Provinces, as follows ^a

The first, was from St Croix to Pemaquid; the second, from Pemaquid to Sagadahock. . . . A copy of some grant or agreement^b concerning one of the provinces to Capt. Mason was sent over, signed Lenox, Hamilton, Arundel and Surry [*sic*], Carlisle, Stirling, Edward Gorges, Ferd. Gorges. Attested by Thomas Maydwell, Not. Pubc. It has been said, that the Marquis of Hamilton and the Earl of Stirling [Sir W^m Alexander] both, obtained the like instruments, and it is possible all the others might also.^c

It appears by the foregoing extract from the Memorial of the Commissioners that Sir William Alexander afterwards Earl of Stirling did obtain a like instrument and that he had the first Province from the river St. Croix to Pemaquid, assigned to him by virtue of the agreement among the Grantees.^d

Now as the grand Charter of New England, granted to the Council of Plymouth of which Sir W^m Alexander was one, bears date in the year 1620;

St. Croix River the
common boundary
of Nova Scotia and
New England
under Plymouth
Charter

As the grant to Sir William Alexander of the Province of Nova Scotia bears date in the year 1621;

As the western bounds of the latter Province are a North line from St. Mary's bay, crossing the entrance or mouth of the Bay of Fundy to the river St. Croix, and to the furthest source or spring upon the western branch of the same, thence by a direct line to the North, to the great river of Canada;

As it was solemnly agreed and concluded by all the parties concerned that the bounds of New England, under the grand Charter to the Council of Plymouth, should commence at the river St. Croix, and the first Province in the division of that Territory in the year

¹ The Present State of North America; published in London 1755 and reprinted in Boston the same year, page 6 [page 8 London edition]. The author of the work here cited, which was published anonymously, was probably Ellis Huske, younger brother of Gen. John Huske. See Appleton, Cyclopædia of American Biography, and the Dictionary of National Biography.—EDITOR.

^a Hutchinson, Vol 1, page 50.

^b Ibid, page 52.

^c These grantees expected upon surrendering their grand Charter to obtain new patents of the twelve Provinces, assigned them respectively in this division. Hutchinson, *passim*, and Douglass, Vol. 1, page 366.

^d Vide Gov^r Hutchinson's Report in the Appendix, p. 137-142, 3. [The appendices are not given.] Also Governor Bernard's Proclamation 7 Septem^r 1763.

1635, among the grantees, commenced at the river St. Croix, and extended from thence to Pemaquid;

As the river St. Croix generally was thus by solemn compact, settled and agreed upon to be the boundary between New England and Nova Scotia, and the middle therefore of that river was the line of division between the two countries or Provinces, agreeably to the terms of that agreement or compact;^a

It follows incontestibly:

That the western boundaries of the Province of Nova-Scotia, viz., a line along the middle of the river St. Croix to the furthest source or spring upon the western branch of the same, and a line directly North from thence to the great river of Canada, were the known and established ancient Eastern boundaries of New England under the grand charter to the Council of Plymouth.

Here then is the true and obvious reason that is demanded by the Agent of the United States,^b why the Eastern Extent of Massachusetts has been supposed at a place, bay, or river, called St. Croix, because the river St. Croix was in fact, the original western boundary of the Province of Nova Scotia, upon which the ancient Territory of New England, of which Massachusetts was the most Eastern Province at the time of the Treaty of Peace in 1783, was bounded by the solemn compact and agreement of the Proprietors of both Provinces, Countries, or Territories, when all their charters, or letters Patent were in full force: and why the river St. Croix has been anciently considered as a line of boundary, because by that solemn compact and agreement, the practical line specified in the grant of the Province of Nova Scotia to Sir William Alexander, was by common consent made the boundary line between the two countries or Provinces.^c

Originally according to Captain Smith's map [1614] approved of by the court of England, New-England extended from twenty miles east of Hudson's-River, northward to the river St. Croix, or perhaps to the gulph of St. Lawrence, including Nova-Scotia, a subsequent peculiar grant.^d

^a "Every River that parts two Provinces shall equally belong half way over to that Province it lies contiguous to." Hazard's Collections, Vol. 1, page 383. Vide Appendix N° 3. [The appendices are not given.]

^b Part 2, Sect. 33.

^c "This country was called Nova Scotia by Sir William Alexander, secretary of state for Scotland; by means of Sir Ferdinando Gorge [*sic*], president of the New-England or Plymouth company, he obtained a royal grant, Sept. 10, anno 1621." Douglass, vol. 1, p. 305.

^d "That part we call New England is betwixt the degrees of 41 & 45." Smith's description of New England, Edition 1606. Douglass, Vol. 1, p. 374. [Captain Smith went to New England in 1614, and the date of his Description of New England is 1616, not 1606.—EDITOR.]

^a It is true that the Letters Patent of King James the 1st, dated the 3^d November 1620, granted all the country lying between the 40th and 48th degrees of North Latitude, to the "Council established at Plymouth in the county of Devon, for settling, planting, ruling, and governing all that country by the name of New-England."

But Douglass observes ^b that:

Their patent was designedly extended much north and south, to include and keep up the English claim to New Netherlands in possession of the Dutch to the southward, and to L'Accadie, since called Nova Scotia,^c then in possession of the French, to the northward. . . . Thus Nova Scotia and Sagadahock, or the former Duke of York's property, at that time in possession of the French, were by the Massachusetts charter [in 1691] annexed in jurisdiction to Massachusetts Bay.^d

We have seen that Sir William Alexander's Patent of Nova Scotia, was dated the 10th of September 1621.

The grants of that day are so inconsistent with each other, as referring to the Degrees of Latitude by which the Territories included in them are described, that we must resort to the bounds by which the country was actually divided, & taken possession of under them respectively, by the general consent, compact, and agreement, of the several and respective grantees and proprietors, and all others concerned in interest at the time to understand the history of the several settlements, to discover the actual & real boundaries of the countries of which the names are mentioned, and indeed to read any of the accounts of the first discoveries and settlement of the British Colonies in North America, with any degree of intelligence or satisfaction.^e

^a Douglass, Vol. 1, page 386.

^b Douglass, Vol. 1, page 366.

^c So that this country was not called Nova Scotia, 3^d November, 1620.

^d "In 1620 a dispute arose between those [the London and Bristol companies] about the former's right to fish at Cape Cod upon which a new Patent, was granted to the latter, and to several other Noblemen and Gentlemen for all the country from 40 to 48 degrees North Latitude. The grant extends due west from the Atlantic to the Pacific Ocean, if then not actually possessed by any Christian prince or people. And this new Company was called the Council of Plymouth or New England, which latter name was given to this Country upon Captain Smith's presenting a plan of it, to the Court of England on his return in 1614, and it retains the name to this day from 20 miles East of the city of New York, as far as the river St Croix." The present State of North America published in London 1755, & reprinted in Boston the same year page 9. [It is page 12 in the London print. See *supra*, 196.—EDITOR.]

^e "It is frequently very difficult, and almost impossible to reconcile the letter of the boundaries of two old grants; because more was granted, than had been surveyed, or perhaps more than had been discovered; therefore the lines were ill expressed, in loose general terms, and frequently interfering; which cannot be adjusted but by amicable voluntary conventions and agreements of the parties concerned; to be explained and confirmed by the King in council, the original granter." Douglass, Vol. 1, page 417.

But not to digress too far from the point more immediately under consideration, it follows also from the authorities last cited, that the river St. Croix of De Monts in 1604, of Sir William Alexander in 1621, and of Razilly in 1632, was also the river St. Croix of the grand Council of Plymouth in 1635.

By the Treaty of Saint Germain in 1632, "all places possessed in New France, Canada, and Acadie," are restored by Great Britain to the Crown of France.^a

In the year 1635^b the Council of Plymouth, or rather the Council of New England established at Plymouth, surrendered their grand Charter.

France continued in possession of the country of Acadia^c till the year 1654, "when an Officer, commissioned by Oliver Cromwell made a descent in the river St John, and took from the French the Forts Pentagoet, St. John, and Port Royal."

During all this time, the same river St. Croix, originally named by De Monts, is uniformly and universally referred to and contemplated under that name by all the French writers and historians as may be seen by recurring to them.

In 1660 King Charles the second was restored. The territory bounded Easterly upon the western limits of the Province of Nova Scotia, granted to Sir William Alexander, being in the hands of the Crown, by the surrender of the New England Charter in 1635, King Charles the 2^d on the 12th March 1663-4, granted to his brother the Duke of York, all that part of the main land of New England, beginning at a certain place, called or known by the name of St. Croix, next adjoining to New Scotland in America, and from thence extending along the Sea Coast, to a certain place called Pemaquid, and up the river thereof to the furthest head of the same tending to the river Kenebeck, and so up to the northward the shortest course to the river Canada.^d

It is impossible to read the bounds of this grant, without being struck with the evident reference there is in it, to Sir W^m Alexander's Patent of the Province of Nova Scotia, to the grand Charter of the Council of New England, established at Plymouth, surrendered in 1635, and the Compact and agreement previous to that surrender between the Grantees and Sir William Alexander.

The following observations are obvious:

1. That the particular limited and defined territory or country,

^a "Tous les lieux occupés en la Nouvelle France, Canada, et Acadie."

^b Hutch. Hist. Vol. 1, page 52-315.

^c Memorial English & French Commissaries, page 403.

^d Sullivan's History, page 160; Douglass, Summary, Vol. 1, page 382.

Summary of deductions from preceding proofs called New England, was comprised within, and ascertained by the grand Charter to the Council of New England, established at Plymouth dated in 1620.^a

2. That the eastern bounds of this territory of New-England, comprised in this charter of 1620, were ascertained by the western bounds of the Province of Nova Scotia, granted to Sir William Alexander, and the anterior and subsequent compact and agreement between the Proprietors of both Territories.
3. That the words, "all that part of New England, beginning at a certain place called or known by the name of St. Croix, adjoining to New Scotland in America," evidently relate to those Charters of New England, and Nova Scotia, and the dividing line before mentioned between them, along the middle of the river St. Croix, to the furthest source or spring upon the western branch of the same, & thence directly North to the Great river of Canada.
4. That there was therefore no necessity to describe more particularly the Eastern lines of the grant as they were ascertained by the reference in the grant to St. Croix, the western bound of New Scotland.
5. That the place called or known by the name of St. Croix, must clearly mean the river St. Croix, which formed the western boundary of Nova Scotia, and was established as the boundary between New England and Nova Scotia, in the manner we have seen, otherwise this grant will have no eastern line of boundary, and would be a mere nullity.
6. That the western line of the grant, conforming so exactly to this Eastern line, confirms and establishes the construction here contended for; the western line being "a certain place called Pemaquid, and up the river thereof, to the furthest head of the same tending to the river Kennebeck (which lies westward of Pemaquid) and so up to the Northward, the shortest course to the river Canada."
7. That from this conformity in many respects, there is a strong probability, that the boundaries of this territory granted to the Duke of York, were the same with those of the first Province of New England from St. Croix, to Pemaquid, in the division of the New England Territory before mentioned; but as a copy of the Instrument,

^a It is not meant here that the name of New England as applied to that part of the Continent of North America indefinitely was not known till the date of this Charter. Capt. John Smith in 1614 went up the Country of North Virginia & made a map of it which he shewed to Charles, prince of Wales, afterwards Charles 1st and his Royal highness gave it the name of New-England. Modern Universal History, Vol. 35, page 285.

grant or agreement, respecting this last mentioned Province, unfortunately cannot be obtained, this fact must rest in conjecture.

8. That although the charter of New England was surrendered in 1635, still its boundaries are referred to, in order to ascertain the territory granted to the Duke of York, equally with those of the Province of Nova Scotia, the grant of which to Sir William Alexander then remained in full force.

9. That the river St. Croix of De Monts in 1604, of Sir William Alexander in 1621, of Razilly in 1632, and of the Council of New England in 1635, was also the river St. Croix of the Duke of York in 1664.

There are some circumstances not to be omitted which strongly confirm the preceding observations, as well as the foregoing remarks upon the proposed division of the New England territory into twelve Provinces, which are these—
That the fourth of those Provinces was “along the Sea Coast from Sagadahock to Piscataqua.”^a

Confirmatory circumstances

Here Sagadahock river and Piscataqua river are not mentioned and yet the boundaries of this fourth Province, which was assigned to Sir Ferdinando Gorges, and granted to him by the Council of Plymouth or New England,^b the 22^d of April 1635, which grant was afterwards confirmed by the Crown April 3^d 1639, are described as follows:—

Beginning at the entrance of Piscataqua Harbour, and so to pass up the same into the river Newichawocke, and through the same into the farthest head thereof, and from thence northwestwards till one hundred and twenty miles be finished, and from Piscataqua Harbour mouth aforesaid, northeastwards, along the sea coast to Sagadahock, and up the river thereof to Kenebecky river, and through the same to the head thereof, and unto the land northwestward, until one hundred and twenty miles be ended, being accounted from the mouth of Sagadahock, and from the period of one hundred and twenty miles aforesaid, to cross over land to the hundred and twenty miles end, formerly reckoned up into the land from Piscataqua Harbour, through Newichawocke River.

Here we see the same general course of boundaries westward and northward as is established in the lines of the first of these Provinces, afterwards the Duke of York's Territory which is bounded Easterly upon the western limits of Nova Scotia, viz., the river St. Croix through its western branch, and thence northward &c.

^a Hutchinson, Vol. 1, page 50.

^b Douglass, Vol. 1, page 387; Sullivan's History, Ap. No 1. [In the version of the grant to Gorges printed in Appendix No. 1 to Sullivan's History of Maine, 1795, p. 397, the word Piscataqua is spelled Pascataway, and Sagadahock is spelled Sagedebadocke.—EDITOR.]

Another satisfactory reason for this course of these boundaries will naturally suggest itself, when our attention shall be drawn to the circumstance, that the course of the main branch of most, if not all the great rivers upon the eastern coast is westerly, as will be observed in the subsequent part of this argument.

By the Treaty of Breda in 1667 the King of Great Britain stipulated to surrender and restore to his most Christian Majesty, "the country called Acadia situate in North-America, which his most Christian Majesty had formerly enjoyed." In consequence of this treaty, Acadia was once more restored to France.^a

In the year 1690, England being then at war with France, an expedition was undertaken by the Colony of Massachusetts Bay against the French settlements in this Country, and the command given to Sir William Phips, who took possession of the whole Sea coast from Port Royal to Penobscot, and the New England settlements, administering an oath of allegiance to the people who remained after the capitulation; but they soon revolted and Sir William Phips's reduction and possession was only momentary.^b

We are now come to the Charter of King William and Queen Mary to the Province of Massachusetts-Bay, dated the 7th October 1691.

By this Charter the former Colony of Massachusetts Bay, the Colony of New Plymouth, the Province of Maine, the territory called Acadia or Nova Scotia, and all that tract of land lying between the said Territory of Nova Scotia and the Province of Maine, are erected into one Province by the name of Massachusetts Bay in New England.

The Colonies of Massachusetts Bay and New Plymouth were held by the respective proprietors and inhabitants, under grants from the Grand Council of Plymouth. The former was afterwards confirmed by a Grant, or Charter from King Charles 1st. "The Province of Maine" was the same territory of which the grant has been already recited to Sir Ferdinando Gorges, and which had previous to the Charter of William and Mary been conveyed by the heir of the said Gorges to the said Colony of Massachusetts Bay.

The territory of Acadia or Nova Scotia, was the same territory which was granted to Sir William Alexander in 1621, bounded westerly by the river St. Croix, as will presently appear; and, "the Tract of land lying between this territory of Nova Scotia, and the said

^a "Le pays appelé l'Acadie, situé dans l'Amérique septentrionale, dont le Roi Très-Chrétien a autrefois joui." Memo. Eng. & Fr. Com. page 21.

^b Memo. English and French Commissaries, page 417; Hutchinson, Vol. 1, page 397; Douglass, Vol. 1, page 307.

Province of Maine," was the territory granted to the Duke of York, which had reverted to the Crown by his subsequent accession to the Throne; and by his abdication was vested in his successor. This territory as we have seen was bounded easterly upon the same river St. Croix, and was afterwards commonly called by the name of the Territory of Sagadahock.

At the time this Charter was granted in 1691, both Nova Scotia and the Territory of Sagadahock were in the possession of the French and annexed to the Jurisdiction of Massachusetts Bay; "merely with an intent to support and continue the claim of the Crown of England against the French King, it was necessary to extend some kind of Jurisdiction over it, against the encroachments of other Nations. There were no people there, but the French and savages devoted to that Nation; it could not be readily peopled by English families, and therefore a grant to Massachusetts was the only proper expedient to support the English claim, and to save the expence of a Government where there were no subjects to pay it." ^a

Comformably to this statement Dr Douglass tells us,

When Massachusetts-Bay colony obtained a new Charter the 7th October 1691 Nova Scotia at that time in possession of the French, was annexed (as was also Sagadahock, or Duke of York's property) to the Massachusetts jurisdiction, to keep up the claim of Great Britain. . . .^b Nova Scotia and Sagadahock, or the former Duke of York's property, at that time in possession of the French, were by the Massachusetts charter annexed in jurisdiction to Massachusetts-Bay; the court of Great Britain, notwithstanding, seem to reserve their property and jurisdiction there, and accordingly have withdrawn Nova-Scotia from the jurisdiction of the province of Massachusetts-Bay, and constituted it a Kings Government. . . .^c The new charter of Massachusetts-Bay, anno 1691, is a union or consolidation of several separate grants, into one legislature and jurisdiction; for the more effectual protection of the whole, against the incursions of our neighbouring French and Indians.^d

Dr Douglass evidently refers here, among others, to the Grant of Nova Scotia to Sir William Alexander:

Nova Scotia, and this tract called Sagadahoc were annexed to this neighbouring charter to keep the English claim, they being at that time in possession of the French; since that time by the treaty of Utrecht in 1713, they have been quit claimed by the French to the crown of Great Britain; and Nova-Scotia has been constituted

^a Argument of the Agent of the United States, part 2^d Sect. 38. [See original passage, *supra*, 117.]

^b Douglass, Vol. 1, page 330.

^c *Ibid.*, Vol. 1, page 366.

^d *Ibid.*, Vol. 1, page 374.

a separate property, & jurisdiction, or government. Sagadahoc hitherto continues annexed to Massachusetts-Bay province; but as it is not the absolute property of the province perhaps from a large extent of a frontier, defenceless in itself, it is more of an incumbrance, than of any advantage.^a

The jurisdiction *pro tempore* but not the property of Sagadahock or Duke of York's grant, is in the Province of Massachusetts-Bay, as was also Nova Scotia—by the present charter.^b

The underwritten Agent will in another place fully establish, that the grant of the Soil of the Province of Nova Scotia to Sir William Alexander remained unrevoked, and in full force when the Charter of the Massachusetts Bay was granted in 1691,^c although the Jurisdiction and government of it as a province was dissolved by the cession of the country to France by the Treaty of Saint Germain in 1632. That the jurisdiction merely, and not the property in the soil of the Province of Nova Scotia, was annexed to the Province of Massachusetts Bay, by their Charter, appears by the express reservation in the Charter itself, of the rights, as well of those who held under Sir William Alexander's grant of the Province of Nova Scotia as of other grantees & proprietors under the Old Colonies, of which this new Province was composed. It is expressly provided in the Charter,

Property in soil
under Alexander
grant unrevoked

That all and every such lands, tenements, and hereditaments, and other estates which any person or persons, or bodies politic or corporate, towns, villages, colleges, or schools, do hold and enjoy, or ought to hold and enjoy, within the bounds aforesaid, by or under any grant or estate duly made or granted by any general court formerly held, or by virtue of the letters Patent therein before recited, or by any other lawful right, or title whatsoever, shall be by such person and persons, bodies politic and corporate, towns, villages, colleges, or schools, their respective heirs, successors & assigns, forever hereafter held and enjoyed, according to the purport and intent of such respective grant, under and subject nevertheless to the rents and services thereby reserved, or made payable, any matter or thing whatsoever to the contrary notwithstanding—

and it is accordingly further provided in a subsequent clause of the charter,

That no grant or grants of any lands lying or extending from the river Sagadahock, to the Gulf of St. Lawrence and Canada Rivers, and to the Main Sea northward and eastward to be made or passed by the Governor and General assembly of our said Province be of any force, validity, or effect, until his Majesty, his heirs or successors, shall have signified his or their approbation of the same.^d

^a Douglass, Vol. 1, page 376. ^b Ibid., Vol. 2, page 43. ^c Vide reply, part 2.

^d Vide this Charter at large in the appendix, page 165. [The appendices are not given.]

In this sense the Charter was always understood by the Massachusetts Bay and that Province never at any time claimed or pretended to have any right or title whatever to the property of the soil of the Province of Nova Scotia, under or by virtue of their Charter, and very soon after the date of it formally relinquished even their jurisdiction over it.

Governor Hutchinson in his history tells us ^a that in the year 1696, the General Court of the Province of the Massachusetts Bay from a sense of their inability to protect the Province of Nova Scotia, "petitioned the crown that the province might be freed from any further expence in the defence of Port royal, or St John's, and that—Garrisons might be kept in both these places, at the charge of the nation."

But with respect to the jurisdiction, it is to be observed, that as the terms of the Charter itself imported only the erection of a government over the Territory of Nova Scotia, & not a grant of the soil; that government or jurisdiction was dissolved & lost by the surrender of the territory to the Crown of France by the Treaty of Ryswick in 1697, and therefore upon the recovery of the soil by the Treaty of Utrecht, the King of Great Britain again constituted Nova Scotia a separate Province or Government.^b

Treaty of
Ryswick, 1697

Anno 1717, Colonel Phillips was appointed Governor of Nova Scotia ^c in order to colonize this country:

Governor Phillips had a royal instruction to form a council for the management of the civil affairs of the province; and accordingly in 1720 did appoint twelve councillors. . . . Colonel Phillips, with advice and consent of his council, is impowered to grant lands under certain limitations, but in general at one penny sterling per annum per acre quit rent. . . .^d Nova Scotia is divided into ten or twelve districts; each district annually chooses one deputy to be approved by the commander and council at Annapolis; he is a sort of agent for the district, and reports the state of the district, from time to time.^e

We come now to the point of enquiry more immediately under consideration, whether the Territory of Nova Scotia annexed in

^a Hutchinson, Vol. 2, page 91.

^b "After the Treaty of Utrecht, when possession was returned to the Crown, it [Nova Scotia] was settled a distinct province." [Hutchinson,] Vol. 2, page 91.

^c His commission contained no specific description of the boundaries of the Province. The Province of Nova Scotia therefore of which he was appointed Governor, must have been the Province of Nova Scotia as originally limited in the Charter to Sir William Alexander. Vide Appendix, p. 43. [The appendices are not given.]

^d Douglass, Vol. 1, pp. 328, 329.

^e Douglass, Vol. 1, page 333.

jurisdiction to the Province of Massachusetts Bay, by the Charter of 1691, was not bounded westerly by the same river St. Croix which formed a part of the original western boundary of Nova-Scotia in the charter of Sir W^m Alexander in 1621.

That this must have been the case is obvious from the very name of the Territory. It has been already observed, and it is a truth beyond all contradiction^a that until the grant passed to Sir William Alexander in 1621, no Province, Country, Territory, District, or Place, whatsoever in America was ever called or known by the name of Nova Scotia, & that this grant defined the limits of the Territory or Province to be called by that name forever thereafter.

When therefore Nova Scotia was included in the subsequent grant or Charter of 1691, it must have been included under the same limits or boundaries, as no other boundaries are assigned to it in the Charter; and no Country or Territory called Nova Scotia had ever had any specific limits assigned to it different from those in the Grant to Sir William Alexander.

If it shall be said that the name of Nova Scotia, after the year 1621, communicated itself to the whole country^b of Acadia as far as Penobscot or Kennebeck, according to the different claims at different times of the French as to the extent of Acadia, and which appears to have been the case by the terms Nova-Scotia or Acadia being used as meaning the same Territory in the Treaty of Utrecht, this is readily admitted to be true, but the Charter of 1691 having specifically mentioned the Territory lying between the river Sagadahock and Nova Scotia, as separate and distinct from Nova Scotia, it is evident that by Nova Scotia in this Charter must have been intended the ancient Province of Nova Scotia as described in the grant to Sir William Alexander, bounded westerly by the river St. Croix, to the exclusion of that part of Acadia lying westward of this river.

And in this sense have the words been uniformly understood, not only by all the parties interested, and by English writers and historians, but even by the French, in their construction of this Charter of 1691.

To begin with the latter. The French Commissaries in their Memorial, dated the 4th October 1751, giving their construction of this Charter of William and Mary, say that by the second disposition of this Charter the King of England, who was then at war with France,

^a Vide ut ante, page 16. [Supra, 175.]

^b "Acadie has been stretched and contracted at different times as the French found it to serve their interest." Hutchinson, Vol. 2, page 110.

re-annexed likewise to New England all that part of the possessions of the French in America, to which the English had given the name of Nova Scotia, and also all the country situated between this ideal^a Province, and New England, which according to the English system should extend from the river St. Croix to the River Sagadahock^b—And again:

It is moreover remarkable that all the Country situated between the rivers St Croix^c and Sagadahock is specified in the English Charter, but is not named; from which it is evident in the first place, that England herself comprehended it, neither under the name of Acadia nor Nova Scotia.^d

In the state of the case drawn up^e by order of the Board of Trade in 1731, after calling before them the Agent of the Province of Massachusetts Bay, in order that the opinion of the attorney and solicitor general might be taken thereon, respecting the construction of the Charter to William and Mary, this Tract of land mentioned in the Charter as lying between Nova Scotia and the Province of Maine is expressly called, “a tract of land lying between the rivers St Croix and Kennebeck (Sagadahock).”^f

And the Attorney and Solicitor General in giving their opinion on this point say: “It appears to us that all the said tract lying between the rivers Kennebeck and St. Croix, is among other things granted by the said Charter to the Inhabitants of the said Province” &c.^g

^a The French Commissaries called this Province *ideal* considering the grant thereof as being void in itself, *ab initio* for reasons which do not affect the present cause which are stated at large and discussed fully in the Memorials & clearly refuted by the British Commissaries.

^b Par une seconde disposition de cette Charte, le Roi d'Angleterre, qui étoit alors en guerre avec la France, réunit pareillement à la Nouvelle Angleterre toute la partie des possessions des François en Amérique, à laquelle les Anglois avoient donné le nom de Nouvelle Ecosse; et tout le pays situé entre cette province *idéale* et la nouvelle Angleterre, ce qui dans le système Anglois doit s'étendre depuis la rivière de Sainte-Croix, jusqu'à celle de Sagadahock. Mems. Eng. & Fr. Com. p. 176.

^c Il est d'ailleurs remarquable que tous le pays, situé entre la rivière de Sainte-Croix et le Sagadahock, est désigné dans la Charte Angloise, et n'y est point nommé; ce qui fait voir, en premier lieu, que l'Angleterre elle-même ne le comprenoit point sous le nom d'Acadie, ni même de nouvelle Ecosse, &c. Mem^o. Eng. & Fr. Com. p. 177.

^d Vol. 1, p. 332. [This reference appears here in the State Department copy, but is erroneously placed. It belongs *infra*, under the quotation from Douglass, Summary.—EDITOR.]

^e Vide State referred to in Mr Sullivan's Argument, part 2^d Sect. 51—and Sullivan's History of Maine, page 392.

^f Neither the French nor English Commissaries in these memorials speak of any other river Saint Croix than that named by De Monts in 1604.

^g In this state of the case it is expressly said,—“the Inhabitants of the Massachusetts Bay do not now pretend any right to that part called Nova Scotia, which is likewise included in this Charter.” Vide State.

Now the river St. Croix intended both in the state of the case and opinion thereon, could be no other than the river St. Croix, which was a part of the original western boundaries of Nova Scotia in Sir William Alexander's grant, as a reference to the term Nova Scotia in the Charter of William and Mary could alone authorize the adoption of the term River Ste. Croix, in these instances: the river St. Croix not being mentioned at all in the Charter.

But in the geographical description of the Province of Nova Scotia, annexed in jurisdiction to Massachusetts Bay by the Charter of William and Mary, given by Dr Douglass in his summary, this construction of the term Nova-Scotia in the Charter is abundantly confirmed: after describing that part of the Province lying on the East side of the Bay of Fundy he begins with the westernmost part of the Province on the West side of the Bay as follows:

Upon the opposite or westerly shore of the Bay of Fundy are the rivers Pasamaquady and St. Croix, being about seventeen leagues N. W. from the gut or entrance of the bason of Annapolis: the river St. Croix is the boundary between Nova Scotia government, and the territory of Sagadahock, or the Duke of York's property; for the present in jurisdiction, annexed to the neighbouring New England Province of Massachusetts-Bay.¹

The same observation applies here as was just now made respecting the term river St. Croix in the case and opinion thereon.

This part of the argument it is presumed may be now safely concluded with this inference, at the least in this place, that by the Territory of Nova Scotia, mentioned in the Charter of King William and Queen Mary to the Province of Massachusetts Bay in 1691, was intended the Province of Nova Scotia originally granted to Sir William Alexander in 1621, bounded westerly upon the river St. Croix, originally so called by the Sieur De Monts in 1604.

By the 7th and 8th articles of the Treaty of Ryswick in 1697, all places taken during the war were mutually restored, and the settlement of limits was referred to Commissaries to be appointed.^a

Thus Acadia by treaty was once more restored to France, though the limits of the Country were never settled by Commissaries appointed for the purpose, agreeably to the provision made at the time of the Treaty.

The Treaty of Ryswick was proclaimed in Boston December 10th 1697.^b

¹ Douglass, Summary, I. 332.—EDITOR.

^a Memorials of English and French Commissaries, page 419.

^b Hutchinson, vol. 2, pages 109, 110, 111.

It was understood by the English Court that, by the Treaty of Ryswick, all the Country westward of St Croix was to remain to the English, as being within the bounds of the Province of Massachusetts Bay,^a as appears by Governor Hutchinson's History.

Here further light is thrown upon the true intention and construction of the Charter of William and Mary in 1691.

The English Court could only mean that the true and proper limits of Acadia, the Country restored to the French by the Treaty of Ryswick, were the same with the ancient Province of Nova Scotia, bounded westerly by the river St. Croix; therefore that by the term Acadia or Nova Scotia in the Charter of 1691, was intended this ancient Province of Nova Scotia, described in the grant to Sir William Alexander, and that all the Country westward of the river St. Croix, the Western boundary of this Province, not being restored to France by the Treaty of Ryswick, was still within the bounds of the Province of Massachusetts Bay. There is no other way in which the English Court could have understood the matter in the light they did, consistently with common sense: and it will in another place be shown that they had good grounds for explaining the Treaty of Ryswick in this way, notwithstanding the manner in which Acadia was surrendered to the French by the Treaty of Breda, in 1667.^b

The Norrigewock Indians in the year 1698, built a church at their chief settlement upon Kennebeck river, which was complained of by the Massachusetts Government as a French encroachment.^c

Representations were made (1698) to the Ministry, and the right of the English to the Eastern Country, as far as St. Croix, was insisted upon.^d

Here it appears that the Province of Massachusetts Bay explained the Treaty of Ryswick in the same way with the English Court, and of course gave the same construction to their Charter, which we have just now seen must have been the construction of the English Court; and it is not improbable that these ideas of the English Court may have been derived from these representations of the Province, which was so much interested in the subject, and so industrious in making their applications to that Court upon a matter that so nearly concerned them; for the first intimations that we find from the English Court, of their sentiments upon this subject, are in a letter from the Lords of Trade, dated the 30th October 1700, to the Earl of Bella-

^a Hutchinson, vol. 2, pages 109, 110, 111.

^b Vide ut ante, page 70. [Supra, 202.] Post, Reply part 2, page 114.

^c Hutch. vol. 2, page 111. ^d Ibid., vol. 2, page 111.

mont, the Governor of the Province of Massachusetts Bay, in the following words:

^a As to the boundaries, we have always insisted and shall insist upon the English right as far as the river St. Croix; but in the mean while, in relation to the encroachments of the French and their building a church on Kennebeck river, that seems to us a very proper occasion for your Lordship's urging the general assembly of the Massachusetts-bay to rebuild the fort at Pemaquid, which they ought to have done long ago, and thereby they might have prevented this and many other inconveniences.

But there is another document now to be attended to, which of itself alone is sufficient not only to establish the river St. Croix, mentioned in the grant to Sir William Alexander, as
 Statement of Province of Massa- the western boundary of Nova Scotia, annexed in chusetts, 1732
 Jurisdiction to the Massachusetts Bay by the Charter of 1691, but also to shew that by the territory of Nova Scotia, mentioned in that Charter, was intended the ancient province of Nova Scotia established in 1621.

The statement given by the Province of Massachusetts in the year 1732 or thereabouts in a letter to their Agent, is here referred to, which so far as is material upon the present occasion is as follows:^b "The whole Province of Nova Scotia is expressly included within the Charter to this Province."

Can words more strongly express the sense of the Province of Massachusetts Bay, that it was the ancient province of Nova Scotia that was intended in their charter under the words "Territory of Acadie or Nova Scotia?" In the year 1691, when this Charter was granted, there was not, nor had there ever before that time been any Territory known as the Province of Nova Scotia, but the Province originally established by Sir William Alexander's grant in 1621. This Province only can then be intended by the Province of Massachusetts Bay in this statement. This is confirmed by that part of the statement which follows. "The great difficulty in defending a country so remote from our centre made it a lesser hardship than otherwise it would have been for the Crown to take it from us, after the Peace of Utrecht, and to settle a distinct government there." It has already been shown that the Province of Nova-Scotia was revived after the peace of Utrecht, under the same western boundary at the river St. Croix, that had been established in the original grant of it, in 1621. By the term "lesser hardship," the right of the Crown to make this

^a Hutchinson, vol. 2, page 111.

^b Vide M^r Sullivan's Argument, part 2, Sect. 51. [Supra, 126.]

Province again a distinct government, upon the recovery of it by the Peace of Utrecht, is plainly recognized.

The statement goes on:

But for the country between the rivers Kennebeck and St. Croix, we have been at continual expense in defending it, never imagining our right of jurisdiction, & our right of granting the property conditionally would ever be disputed, & yet as soon as the country is freed from the danger of enemies, our title both to the jurisdiction & property, as to great part of that Country is questioned, and all our grants made in order to forward the settlement of it are disapproved.

The preceding observations clearly show that by the river St. Croix in this place could only be intended the river St. Croix, which was the original western boundary of the Province of Nova Scotia in 1621.

In this part of the statement the Province very properly speaks of its right of jurisdiction, and right of granting the property conditionally in the Country, between the rivers Kennebeck and St. Croix, because it is expressly declared by the attorney and Solicitor General in their opinion given in the year 1732, which has been already under consideration, that this tract of Country, "had never been yielded by the Crown of England to France by any Treaty," conformably to the sentiments of the English Court, expressed in the Letter from the Lords of Trade to the Earl of Bellamont in the year 1700, which has already been remarked upon in this view.

The subsequent part of this statement of the Province of Massachusetts Bay in the letter to their Agent, has no connection with the present cause.

The underwritten Agent has now traced the river St. Croix, claimed by him before this honorable board, on the part of his Majesty, as forming a part of the boundary of the United States in the Treaty of Peace between his Majesty and those States, from its first appellation in 1604, and its adoption in the grant of the Province of Nova-Scotia to Sir William Alexander in 1621, as part of the western boundary of that Province down to the year 1753,^a during all which period this one river only has been contemplated and referred to, under the name of the river St. Croix, "in the French and English histories, and accounts of this country, and in the public transactions, grants, documents, and acts of State of both Nations."

^a Governor Hutchinson's 2^d vol. brings the history of Massachusetts Bay down to the year 1750—it was first published in the year 1767. Dr Douglass's history was written 1748 & published 1749. The Memorials of the English & French Commissaries were written from 1750 to 1753.

He will now proceed to shew that this river St. Croix (called by the Indians Scoudiac) remained and continued a part of the western boundary of the Province of Nova-Scotia down to the Treaty of Peace in 1783, and under the name of the river St. Croix formed a part of the boundary therein described.

St. Croix River,
called Scoudiac
by the Indians, re-
mained boundary
of Nova Scotia
down to Treaty of
1783

The attempt to settle the limits of Acadia or Nova Scotia, as ceded to Great Britain by the Treaty of Utrecht, by the appointment of Commissioners for that purpose, in pursuance of the Treaty of Aix La Chapelle, having proved fruitless; early in the year 1756 war was declared against France, which continuing till the Treaty of Peace in 1763 we find nothing further upon the subject of the boundaries of the Province of Nova Scotia till after that time.

All the French possessions upon the Continent of North-America being by that treaty ceded to Great Britain, the Province of Quebec was created and established by the Royal Proclamation of the 7th October in that year, and bounded on the south by the Highlands which divide the rivers that empty themselves into the river St. Lawrence from those which fall into the Sea or Atlantic Ocean, thereby altering the northern boundary of the Province of Nova Scotia from the southern shore of the river St. Lawrence to those Highlands.

There being no longer any apprehensions of disturbance from the French, it now became necessary for the settlement of the country that had been in dispute between the two Nations to ascertain the boundary line between the Provinces of Nova Scotia and Massachusetts Bay.

In doing this it does not appear that the smallest doubt was ever entertained that the river St. Croix was the western boundary of the former, and the eastern boundary of the latter Province, or that the river St. Croix which constituted this boundary was the same river St. Croix which was originally so named by De Monts in 1604, described by Champlain and L'Escarbot in their Histories, and made the original western boundary of Nova Scotia in the grant to Sir William Alexander in 1621.

Accordingly we find in the first instructions to survey the river St. Croix in order to ascertain the western boundaries of the Province of Nova Scotia, the same river St. Croix which is described by Champlain is pointed out in the Instructions to the Surveyors.

At this time only two rivers appeared, in most of the Maps that had been published, to empty themselves into the bay of Passamaquody,

the westernmost called the Passimaquady river, and the easternmost the river St. Croix.

Governor Bernard at that time Governour of the Massachusetts Bay was desirous to obtain a grant of a tract of land in this eastern country for himself and some other gentlemen associated with him. There were difficulties in procuring any grants of land, lying westward of the boundaries of the Province of Nova Scotia, within the Territory described in the Charter of William and Mary to the Province of Massachusetts Bay as lying between Nova Scotia and the Province of Maine, on account of the claim of the Massachusetts Bay on the one hand to the qualified property in and jurisdiction over this territory by virtue of their charter, the nature of which claim we have seen in their statement to their Agent in 1732, and the doubts entertained by the Crown on the other hand of the validity of this claim, and of the justice of the opinion of the Attorney and Solicitor General by which it was supported; which doubts are stated, in a letter from Mr Mauduit the Agent of the Province of Massachusetts Bay to the General Court dated the 9th June 1764, a copy of which has been laid before the Board by the Agent of the United States.* In this letter Mr Mauduit states that in the course of the business before the Board of Trade, respecting the grants made by the Province of Massachusetts Bay, of lands lying between Penobscot and St. Croix

the chief things insisted on were: that the Lords, notwithstanding the opinion formerly given, are still disposed to think the right of the Province doubtful as to the lands between Penobscot and St. Croix because the case was misstated to the Attorney and Solicitor General, and that, whatever be the determination on this head, yet the Lords think, that the Province can claim no right to the Lands on the River St. Lawrence; because the bounds of the charter are from Nova Scotia to the River Sagadahock; so that this right can not extend beyond the head of that River.

From the whole of this letter it is obvious that the Lords of Trade, and Mr Mauduit, contemplate and refer to an ancient river St. Croix originally established as the boundary between Nova Scotia and New England when they mention the river St. Croix; and that it was considered on all hands as a settled and acknowledged point that the bounds of the Province of Massachusetts Bay were from Nova Scotia, of which this river was the western boundary.

Things being circumstanced as abovementioned, and the Governor of the Province of Nova Scotia being authorised by an order of his Majesty in Council to grant the lands lying within that Province,

* Vide his Argument, part 2^d, Sect. 52. [Supra, 128.]

Governor Bernard was solicitous to obtain a tract for himself and his friends from the Governor of Nova Scotia indisputably within the bounds of that Province, as the validity of the grant might be otherwise impeached, and the great expenses to be incurred in obtaining it, and making settlements in performance of the conditions of it, finally lost.

Accordingly on the 25th April 1764, Governor Bernard issued his orders to John Mitchel, surveyor, appointed with assistants for the purpose, to survey the river St. Croix. It appears by Instructions of Governor Bernard for survey, 1764 these orders or instructions, a copy of which has been produced by the Agent of the United States,^a that Governor Bernard agreeably to some former English Maps contemplated only the two rivers above mentioned—the Passimaquady river, and the river St. Croix, as emptying themselves into the Bay of Passimaquady; and that the description of the river St. Croix in these instructions corresponds with the river St. Croix, described by Champlain, which has been so clearly shewn to be the river Scoudiac, and part of the original western boundary of the Province of Nova Scotia.

The orders are, “that each of these rivers St. Croix and Passimaquady, be surveyed eight miles upon the shores, next to each other, and also the coast between them, and the coast from the mouth of the river Passimaquady, to the extreme point of the bay on the west side of it, including the Island of Passimaquady.”

This part of the survey is evidently contemplated as being on the western side of the bay and perfectly accords with the situation of the river St. Croix, or Scoudiac, and of the river Passimaquady or Cop-skook.

The Instructions proceed:

In like manner you are to survey the East side of the bay from the extreme point into the mouth of the St. Croix, connecting it with the first survey by a trigonometrical line across the river as before, &c.

When this is done you are to go up the river St. Croix and when you get to the head of the river, you will find a pond which you must delineate as exactly as you can, and particularly find out the most northern point of it, so as to set it down in your plan. When this is done, you must with a party assisted by the Indians with their Canoes, cross by the usual portage from the Pond into the river Madamwankee^b which falls into the Penobscot and will carry you all the way to Fort Pownal with the stream.

^a Vide his argument, part 3, Sect. 18. [Supra, 151.]

^b This eastern branch of the Penobscot is called by different names, if there is no mistake in transcribing the name of it here. By the Indians it is called Penauki, and in the History of the District of Maine page 37, it is called Passadumkeag.

Here it may be observed:

1. That Governor Bernard did not contemplate any river as emptying itself into Passimaquady Bay, on the Eastern side thereof, or as lying Eastward of the river described by him as the river St. Croix, communicating by a known common portage from a pond or lake at its head or source, with the branch of the Penobscot, which he mentions.

2. That he considered the westernmost branch of the river St. Croix or Scoudiac, extending itself near to the Penobscot, as the main branch of that river retaining the name of the river to its head or source and as the western boundary of Nova Scotia, agreeably to the original boundaries of that Province in the grant to Sir William Alexander in 1621.

3. That there appears in these instructions to be another evident reference to the boundaries described in Sir William Alexander's grant, by the direction to the surveyors to find out the most northern point of this western source of the river St. Croix, so as to set it down in their plan of the survey; as the line due north to the highlands, and completing the western boundary of the Province of Nova Scotia, was there to commence.

The conduct of the Surveyors under these orders, or Instructions, & the grant of the tract of land finally made by the Governor of Nova Scotia to Governor Bernard, and his associates, will be particularly considered in a subsequent part of this argument, and will clearly shew the truth and propriety of these observations.

There is another document still more conclusive to the same purpose with the last; The return made in consequence of a commission issued by Governour Hutchinson, with the advice of ^{Report of Messrs.} the Council of the Province of Massachusetts Bay, to ^{Brattle, Bowdoin} the late General Brattle, M^r Bowdoin, and M^r ^{and Hubbard, 1770} Hubbard in the year 1770, which is stated by the Agent of the United States to be as follows:°

When we consider the description given by M^r Champlain, who we apprehend was the first European that reconnoitred the Eastern shores, and gave the river St. Croix its name, we are convinced that the river St. Croix mentioned in the royal Charter can by no means be the river Passimaquady but that the river Passimaquady being an Indian name was known thereby. When we consider also that there is a living witness, who will swear, that about sixty years ago he used to trade at the St. Croix, that by the Indians he traded with, who were born there, and who always lived there, by the oldest of them, who had it from their Fathers the river St. Croix aforesaid was known by that name, and that St. Croix runs East of

° Vide his argument, part 3, Sect. 19. [Supra, 158.]

Passimaquady; when we consider these things, and many more we could mention, it is plain to us that the river St. Croix, which we call by that name, which is East of Passimaquady is the true river St. Croix & the Eastern boundary of the Province, as mentioned in the Charter.

The underwritten Agent fully agrees with the Agent of the United States in his observations upon this Report: "that altho' in some instances it is incorrect, yet that does not rob it of any part of its weight in this cause," and the following inferences may be fairly drawn from it:

1. That [in] the year 1770, one river only was contemplated by the Government of Massachusetts Bay under the name of the river St. Croix, as emptying itself into the Bay of Passimaquady.

2. That in the year 1770, the Government of Massachusetts Bay considered the river St. Croix described by Champlain, and consequently the same river St. Croix that is mentioned as part of the original western boundary of the Province of Nova Scotia, in the grant to Sir William Alexander in 1621, as "the true river St. Croix and the Eastern boundary of the Province of Massachusetts Bay as mentioned in their Charter."

3. That in the year 1770, the Government of Massachusetts Bay did not consider Nova Scotia as then being within, or a part of the Province of Massachusetts Bay, by virtue of their Charter.

4. That the river Passimaquady does not lie eastward of the river St. Croix, described by Champlain.

5. That it being already fully proved that the river St. Croix, as described by Champlain, corresponds exactly with & can be no other river, than the river Scoudiac, it clearly follows that the river Passimaquady lies westward of the river Scoudiac, and consequently must be the river Copskook, as this is the only river emptying itself into Passimaquady Bay, westward of the Scoudiac.

6. That the trade mentioned by the witness then living to have been carried on with the Indians at the river St. Croix, was at the river St. Croix, described by Champlain, and consequently must have been at the Scoudiac.

7. That there were many more things which the Commissioners, could have mentioned in their Report, in corroboration of the statement from which the foregoing inferences are drawn.

And there certainly were many more things which they might have mentioned, as it is a well known fact, that a great trade was formerly carried on at the St. Croix, or Scoudiac, with the French and Indians, and no such trade was ever known or heard of at the Magaquadavic.

But to proceed: After the Treaty of Peace in 1763, by which the whole country was restored to the possession of the Crown and after the erection of the Province of Quebec, whereby the northern boundary of Nova Scotia was altered; we find the Province of Nova Scotia to be described and bounded in the Commissions to the Governors of it from the King down to the Treaty of Peace in 1783, as follows—

Commissions to
governors of
Nova Scotia

Our Province of Nova Scotia in America, bounded on the westward by a line drawn from Cape Sable across the entrance of the Bay of Fundy to the mouth of the river Saint Croix, by the said River to its source, and by a line drawn due North from thence to the Southern boundary of our Colony of Quebec; to the Northward by the said boundary, as far as the western extremity of the Bay des Chaleurs, to the eastward by the said Bay, and the Gulph of Saint Lawrence, to the Cape or Promontory called Cape Breton in the Island of that name, including that Island, and all other Islands within six leagues of the coast, excepting our Island of Saint John, which we have thought fit to erect into a separate Government, and to the Southward by the Atlantic Ocean, from the said Cape to Cape Sable aforesaid, including the Island of that name, and all other Islands within forty leagues of the coast.^a

Here we find the original boundaries of Nova Scotia as described in Sir William Alexander's Patent, including the same Islands (excepting the Island of St John, which but for that exception would have been included in the same general description) recognized and revived, without any material variation, except what arose from the southern boundary of the newly erected Province of Quebec. And these remained and continued, and were the actual boundaries of the Province of Nova Scotia at the time of the Treaty of Peace in 1783.

In the year 1772 by the directions of the Board of Trade and Plantations, a very accurate survey of this part of the Coast was made by Thomas Wright Esq^r, at present his Majesty's Surveyor General of the Island of St. John, as an assistant to M^r Holland, at that time his Majesty's Surveyor General of the Northern District. A copy of the original plan of his survey of Passemaquady Bay, and the Islands therein, it is agreed by both the Agents, shall be admitted in this cause to prevent the delay & expence that would be occasioned by a new survey, and the same is accordingly now before the Board. In the plan of this Survey made in the year 1772, the river Scoudiac is marked as the great St. Croix and the river Magaquadavic as the little St. Croix. In the Charts therefore compiled from this survey, and afterwards

Survey by Thomas
Wright, 1772

^a See Appendix, page 49. [The appendices are not given.]

published by M^r Des Barres in the year 1778, the river Scoudiac is called St. Croix river, being found to be the river St. Croix, eminently so called, & at that time recognized and established as a part of the original boundaries of the Province of Nova Scotia, as will immediately be made to appear.

The last document that will be relied upon under this head of the argument, is one of the highest nature and authenticity, being an act of the Parliament of Great Britain passed at a period when it did not in any way affect or decide upon the amount of his Majesty's territory, and when the present controversy could not have been foreseen or anticipated.

This act was passed in the year 1774, two years after the survey by M^r Wright, when the river Scoudiac was ascertained to be the true ancient river St. Croix, and forming a part of the western boundary of the Province of Nova Scotia from its original establishment.

^a The Act is entituled, "An Act to restrain the trade and commerce of the provinces of Massachusetts Bay and New Hampshire, and colonies of Connecticut and Rhode Island and Providence Plantation, in North America, to Great Britain, Ireland, and the British Islands in the West Indies; and to prohibit such provinces and Colonies, from carrying on any Fishery on the Banks of Newfoundland, or other places therein mentioned, under certain conditions and limitations." In the 12th Section of the Act it is provided and enacted, "that the river which emptieth itself into Passamacadie or Passamaquady Bay, on the western side, and is commonly called and known by the name of St. Croix river, be held and deemed for all the purposes in this Act contained, to be the boundary between the provinces of Massachusetts Bay and Nova Scotia."

This Act creates no new boundary, it merely recognizes, confirms and establishes that river St. Croix as a boundary between the Provinces¹ of Nova Scotia in the Patent to Sir W^m Alexander in 1621; which was agreed upon, settled, known, and acknowledged, as the boundary between the Province of Nova Scotia, and the territory of New England, granted to the Council of Plymouth in the year 1620; which after the surrender of their Grand Charter, was the boundary between Nova Scotia & the territory granted to the Duke of York in 1664; which was recognized as the western boundary of Nova

^a 15 Geo. 3, Chap. 10.

¹ The copyists of 1798 seem to have omitted, between the word "Provinces" and the words "of Nova Scotia," a phrase reading substantially thus—"which was named as the western boundary." Such a phrase repeatedly occurs in Mr. Chipman's argument, in a similar connection.—EDITOR.

Scotia by the Charter of William and Mary to the Province of Massachusetts Bay in 1691; and which from the Treaty of Utrecht in 1713 was the boundary between the Provinces of Massachusetts Bay and Nova Scotia, received and established by the Crown, & known, acknowledged, and acquiesced in by the Government of the Province of Massachusetts Bay.

That from the time of the passing of this act of Parliament in 1774, the boundaries of the Province of Nova Scotia remained unaltered to the Treaty of Peace in 1783, will not it is presumed be denied. And it will not be difficult now to shew that the river Scoudiac, under the name of the river St. Croix formed a part of the boundary described in that treaty.

It is sufficient here to observe that at the time the Treaty of Peace was made in 1783, the Provinces of Quebec and Nova Scotia belonged to, and were in the possession of the Crown of Great Britain, and that his Britannic Majesty at that time had an undoubted right to cede to the United States of America, such part of these territories as he might think fit, and that in making the cession of the Territory comprised within the boundaries of the United States as described in the second article of the Treaty of Peace, his Majesty must be supposed to have used the terms, describing these boundaries in the sense in which they had been uniformly understood in the British Nation, and recognized in public Documents and acts of government. In this sense and in no other could they have been then understood, or can they now be claimed or insisted upon by the United States. In this sense and in no other is his Majesty bound to give the possession. Whatever river was at that time known and recognized, by his Majesty and the British Government, as the river St. Croix, forming a boundary between the Province of Massachusetts Bay and Nova Scotia, that river, and no other, can now be claimed as a part of the Eastern [boundary] of the United States. It is sufficient that in this act of Parliament the river St. Croix is described by a particular location and boundaries which cannot be mistaken, known to both parties at the time, and assented to on the part of the United States by their accepting the act and not giving any local designation of the river which they now claim, or of any other river than that, thus ascertained by precise description, and known by them to have been established and at the time contemplated by Great Britain, as the boundary between these Provinces. If this principle were once departed from there would be no check to contention on the subject; tho it would be fortunate to his Majesty's interests if he were not thus bound, as it might be clearly shewn in that case that the river Penobscot, once

indiscriminately with the other rivers upon this coast ^a called the St. Croix, was the true boundary, by which Nova Scotia or Acadia was ceded to his Majesty by the Treaty of Utrecht, and ought in such case, by the principles of the Laws of Nations,^b to be established as the Eastern boundary of the United States. But the words in the twelfth Section of the act of Parliament above recited do not in anywise relate to, or suppose any subsisting doubts about the locality, or identity of the river called or known by the name of the St. Croix river, but have reference, as has been fully shewn, to the ancient limits of the Province of Nova Scotia as established by the original grant of it to Sir William Alexander from King James the first in the year 1621, recognized in all subsequent public documents and transactions relating thereto, and claimed by the Province of Massachusetts Bay as their Eastern boundary under the Charter of King William and Queen Mary in 1691.

° The Agent of the United States is, “unable to comprehend the use his Majesty’s Agent intends to make of this Act of Parliament.” He says, “Should his Majesty’s Agent consider it an attempt to fix and determine the bounds of the Province of Massachusetts Bay, the answer is that, the bounds being given by a Charter, the Parliament had no authority to take away a part of the Territory or Jurisdiction.” A position analogous to this respecting the Supreme Power in any government would be a solecism in politics.

In another part of his argument, the Agent of the United States, conceives, that against the proofs he has exhibited,

There is nothing to be urged but an Act of Parliament unconstitutional and illegal by the principles of the Government where it was made, and even under that circumstance, as conscious of doing wrong unless the prerogative of regulating Trade, could sanctify it to that use, declaring its own purpose to be foreign to a permanent settlement of Boundary, or to give a decision upon Provincial real property.^d

No doubt is or ever has been entertained within the British Dominions of his Majesty’s right, by virtue of his royal prerogative, without the aid of an Act of Parliament to erect a new Province or subdivide an old one, and define the respective jurisdictions, unless in cases where the boundaries have been already settled and estab-

^a Vide Mr Sullivan’s argument, part 3, sect. 15 [supra, 142]; 4 Purchas, Pilgrim, page 1635; Sullivan’s History of Maine, page 59; Morse’s Geography, 3^d Edition 1796, page 379; Pownall’s Topographical description of North America, page 20.

^b Vattel, B. 2, C. 17, sect. 308. Vide post, page 184 [MS.].

^c Vide his argument, part 3, Sect. 3. [Supra, 138.]

^d Vide his argument, part 3, Sect. 20. [Supra, 158.]

lished by an Act of Parliament. Thus we find among many other instances, that his Majesty in Council settled the boundaries and jurisdiction between the Provinces of Massachusetts Bay and New Hampshire in the year 1740;^a that he erected the Province of Quebec in 1763, and thereby altered the Northern boundary, not only of the Province of Nova Scotia, as we have seen, but also of the Province of Massachusetts Bay; and that in the year 1784, he subdivided the Province of Nova Scotia by the erection of the Province of New Brunswick. Indeed it is by an exertion of this very prerogative that the Province of Massachusetts Bay was established by the Charter of William and Mary in 1691, and that the Province of Nova Scotia has been since revived and established as a separate Government, which last measure has been, as has been shewn, acquiesced in and acknowledged as legal by the Province of Massachusetts Bay.

But although his Majesty's Agent contends, that the bounds between the Provinces of Massachusetts Bay and Nova Scotia might, by an Act of Parliament in 1774, have been fixed and determined as that Supreme Legislature of the British Empire might have thought fit, and that if the boundaries so fixed and determined, however different from the present, had remained unaltered till the Peace in 1783, and the Treaty had been the same in bounding the United States upon the Province of Nova Scotia and leaving this Province entire to his Majesty, that in such case both his Majesty and the United States must have been concluded thereby for the reasons that have been given already, and others that will presently be assigned; yet he contends that it has been made abundantly evident, that the Act under consideration created no new boundary, but merely recognized, confirmed, and established that river St. Croix, as a boundary, between the Provinces of Massachusetts Bay and Nova Scotia, which from the year 1621, to the passing of the Act, had continued and remained a part of the western boundary of the Province of Nova Scotia, and that it has been made equally clear, that at the time of the passing of this act, the Province of Massachusetts Bay had neither territory nor jurisdiction, eastward of the river St. Croix described in the Act.

Another answer given to this Act of Parliament is ^b

That the Parliament passed it with an evident conviction that the boundary was not settled, and that they had no right to settle it in that mode, for they say in the Act, that the river therein de-

^a Belknap's History of New Hampshire, vol. 2, page 170.

^b Vide Mr Sullivan's argument, part 3, sect. 3. [Supra, 138.]

scribed, shall be held and deemed the boundary between the two Provinces, for all the purposes in that act mentioned. If the boundary was known and fixed before, there could be no necessity of an Act of Parliament on the subject.

Enough, it is presumed, has been said about the right; and by the smallest degree of attention we may discover why the words, "for all the purposes in this act contained," were inserted in this Section of the Act.

The Act was made to restrain the Trade and Commerce of the Province[s] and Colonies mentioned in it; it was therefore not only unnecessary but improper for the purposes it contained to mention any other part of the boundary, than that upon the Sea Coast, between Massachusetts Bay which was included in the Act and Nova Scotia that was not included in it. These words were then obviously necessary as the Act did not go on to describe the residue of the boundary lines between the two Provinces, the same being altogether foreign to the purposes of the Act; and although the St. Croix river described in the Act, is mentioned as part of a boundary line before that time legally established between the two Provinces, yet as this Act was highly penal, and by the rules of the English Law to be considered strictly, it therefore was necessary to describe the true and legal boundary between these Provinces upon the Sea coast, otherwise the former reputed boundary of Nova Scotia, extending to the Penobscot, might have been insisted upon, in exemption of the penalties of the Act.

The Agent of the United States in his endeavours to obviate the force of this Act of Parliament, further says,

It is true that the Act of Parliament suggests the idea, that the river mentioned in it, was commonly called the St. Croix, but that certainly is no evidence of the truth of the fact. All the evidence which could be before the Parliament, on that point and a great deal more, is now before this Board. The river mentioned in the Act, is as probably, the inlet from the Sea, called the Cobscook as the Scoudiac, and there is evidence in the case, that the Governor and Surveyor General of Nova Scotia, believed that to be the fact.¹

To these observations it may be replied that this description in the Act, of the river which empties itself into Passimaquady Bay, on the Western side, as being commonly called and known by the name of St. Croix river is evidence of its having been at that time called and known by that name; for the presumption is violent, that in a solemn deliberate exercise of their highest powers in passing this

¹ *Supra*, 138-9.

Act, the three branches of that august Legislature, would not make use of such a description if it was false, or without evidence of the truth of the fact. But admitting the Act itself to be no evidence of Truth of the fact; there has been produced the fullest evidence to this Board of this river which empties itself into Passimaquady Bay on the Western side, or in other words the river Scoudiac, having been called and known by the name of the river St. Croix from the year 1604, down to the time the Act passed, and of its having during all that time been known and considered, as the western boundary of the Province of Nova Scotia, a great part, if not all of which evidence, and particularly the recent surveys in the year 1772, may be fairly presumed to be in the contemplation of the Legislature when the Act passed.

If we could suppose it possible for the British Parliament purposely to misrepresent the true ancient western boundaries of the Province of Nova Scotia, there could have been no inducement, at the time this Act passed, to assign any other than the true boundary, and if the river Magaquadavie had been really the ancient river St. Croix, and boundary between these Provinces, it would doubtless have been described in the Act as such, as it was the design of it to render the restrictions upon the Trade and Commerce of Massachusetts Bay as effectual as possible, and policy at that time dictated a description of it, by its utmost bounds for the purposes of that Act. It is said in the History of the District of Maine^a that "since the Treaty of Paris in 1783, the English have made the river of Schooduck the St. Croix," but it must be acknowledged that the British Government considered this river as the St. Croix, as far back as the survey in 1772, or at least in the year 1774, when this Act of Parliament passed, and when the present question could not have been foreseen or imagined.

It is acknowledged that the river Cobscook also empties itself into Passamaquady Bay, on the western side, and that for want of sufficient enquiry, it had at one time, some years before the passing of this Act of Parliament, been considered by the Government of the Province of Nova-Scotia as the river St. Croix described by Champlain, and mentioned in the Patent to Sir W^m Alexander in 1621, and that under that idea, a grant had passed under the seal of that Province of a tract of land bounded upon this river Cobscook, as being the ancient river St. Croix, originally made a part of the western boundary of Nova Scotia; but a more thorough investigation of the subject and of the survey by order of the Board of Trade in 1772, had rectified this mistake, so that by the river St. Croix, mentioned in the Act of

^a Vide History of the District of Maine, page 59.

Parliament, no other river than the River Scoudiac could have been intended.

Thus by an Act of the highest authority in the British Nation, to whom the whole country at that time belonged, and which had an undoubted right to ascertain, establish, and declare the boundaries between the different Provinces of the Empire, this river emptying itself into Passimaquady Bay, on the western side, commonly called and known by the name of St. Croix river otherwise called the Scoudiac is declared to be the boundary between these Provinces. This Act was in the knowledge of all the Commissioners who made the Treaty of Peace; by this Act both the American and British Commissioners knew that his Britannic Majesty must be bound, and the obligation was of course reciprocal upon the United States; for if the American Commissioners did not conceive the United States to be equally bound by this Act; or contemplated the river Magaguadavic as the true ancient St. Croix, forming the eastern boundary of Massachusetts Bay, they should have explained themselves at the time.

^a "If he who can and ought to have explained himself clearly and plainly has not done it, it is the worse for him; he cannot be allowed to introduce subsequent restrictions which he has not expressed. This is a maxim of the Roman Law: *Pactionem obscuram iis nocere in quorum fuit potestate legem apertius conscribere*. The equity of this rule is extremely visible, and its necessity is not less evident; there can be no secure conventions, no firm and solid concession, if these may be rendered vain by subsequent limitations that ought to have been mentioned in the piece, if they were included in the intentions of the contracting powers."

^b "If he who has expressed himself in an obscure or equivocal manner, has spoken elsewhere more clearly on the same subject, he is the best interpreter of himself. We ought to interpret his obscure or vague expressions in such a manner that they may agree with those terms which are clear and without ambiguity, which he has used elsewhere, either in the same treaty, or in some other of the like kind." Here seems to be the true rational principle of interpretation, that it must conform to former National diplomatic acts, & public documents and transactions, where the terms about which the doubt arises, have been made use of, which were within the knowledge of both parties at the time of treating, and not objected to or controverted by either, for silence in such cases must be construed into consent or there is at once an end to all faith among Nations.

^a Vattel, B. 2, C. 17, Sect. 264.

^b Vattel, B. 2, C. 17, Sect. 284.

A just application of these principles to the mass of proofs that have been discussed in the foregoing argument, from the original creation of the Province of Nova Scotia, and the histories of Champlain and L'Escarbot, early in the last century down to the Act of Parliament in 1774 inclusive, forming a clear, uniform, and consistent chain of evidence concluding to one point, in support of his Majesty's claim, must it is presumed, produce the fullest conviction in every unprejudiced mind, that at the time when the Treaty of Peace was made in 1783, the river St. Croix which emptieth itself into Passimaquady Bay on the Western side, otherwise called the Scoudiac, formed a part of the Western limits of the Province of Nova Scotia, that it must [have] been so understood by the contracting powers, that the intention of the Treaty must now be interpreted accordingly, and consequently that that river was truly intended under the name of the river St. Croix in the Treaty of Peace and forming a part of the boundary therein described.

The river intended under the name of the river St. Croix in the Treaty of Peace, being proved to be the river Scoudiac, the next step will be to ascertain its source in order to find out the North West angle of Nova Scotia at which the boundaries of the United States commence. On this

Source of the
St. Croix

head the grant to Sir W^m Alexander is conclusive and will at once dispel every shadow of doubt, by the clear, precise, and unequivocal terms in which it is expressed. The first edition of Champlain's History was published in 1613, and the third edition of L'Escarbot's History in the year 1617, several years before the date of Sir W^m Alexander's grant, and the particulars discovered or known by the French respecting the Isle and river St. Croix appear to have been known^a by Sir William, when his Patent was obtained; and among other things, we find it mentioned by Champlain, that there was a portage from the river St. Croix to the Norembegue or Penobscot, and another to the river St. John's. The branches of the river St. Croix must therefore have been known, as indeed appears by the map annexed to L'Escarbot's History, and by the grant itself, specifying the western as the main branch. The boundaries of the province of Nova Scotia, established by this grant, were for all the purposes of the present enquiry as follows: "From Saint Mary's Bay to the North, by a direct line crossing the entrance of the grand bay (of Fundy) to the river commonly called by the name of the St. Croix, and to the furthest source or spring, upon the western branch of the same which

^a Vide Treatise entitled, "An encouragement to Colonies by Sir W^m Alexander"—published in London 1624—an extract therefrom in page 54—*ante* in notes. [Supra, 176.]

first mingles its waters with those of the said river." Or as it stands in the original Latin, "*ad fluvium vulgo nomine Sanctæ Crucis appellatum, et ad scaturiginem remotissimam sive fontem ex occidentali parte ejusdem, qui se primum prædicto fluvio immiscet.*" Thus then the western branch of the St. Croix river, otherwise called Scoudiac, is expressly made a part of the boundary of the Province of Nova Scotia at its original creation, and extending to the furthest or most remote source, head, or spring thereof.

Champlain in speaking of the Portages from this river very naturally mentions the one from the main river to the Penobscot before that from the branch to the river St. John; indeed this river is by all Geographers laid down as extending westward near to the Penobscot, and was so considered as we have seen by Governor Bernard in the year 1764.

In the description given of this river in the history of the District of Maine, we find that,^a "On the northwest angle of this bay, [Passamaquaddy] the River Schooduck finds the general receptacle, and extends westerly a great way into the country. Two hundred miles from its mouth, as its courses are, that river comes within one mile of the east branch of Penobscott, where there was an Indian carrying place, from the one to the other." And Dr Morse in his "American Universal Geography,"^b tells us, "There are three rivers which fall into the bay of Passamaquoddy, the largest, is called by the modern Indians the Scoodick, but by De Mons and Champlaine, *Etchemins*. Its main source is near Penobscot river with which the Indians have a communication; the carrying place between the two rivers is but three miles."

In this respect this river corresponds with several of the great rivers Eastward of the Connecticut,^c and with this accords the Testimony of

^a Sullivan's History, page 40, published in 1795.

^b Vide 3^d Edition published in 1796, page 156.

^c The source of the river Saco is on the side of the White Mountains in New Hampshire, Sullivan's history, p. 25. "When we have gone 40 or 50 miles up the Androscoggin, or Amariscoggin, we pursue the southern or western branch to the White Mountains." Ibid. page 30. "At 100 miles distance, or perhaps more from the mouth of the eastern branch, the source of the main or western branch of the Kenebeck is found extended a great distance along side the river Chaudiere, which carries the waters from the high lands into the St. Lawrence." Ibid. page 32. The west branch of the Penobscott continues into the country under the name of Penobscott, "and at the distance of 40 miles from the head of the tide we see the river Passadumkeag emptying its waters into the Penobscott from the east. . . . The west branch of Penobscott takes its waters on the northwest of the eastern branch of the Kenebeck, and in its course runs so nigh to Moose pond as to give a carrying place of less than two miles from the one to the other; here the Savages come from Quebeck to Penobscott," &c. Ibid. page 37.

The west branch of the river Saint John is also the main branch and retaining that name extends westward to the Chaudiere.

the Indians of the present day, who in their examination before this honorable Board declared that all the Lakes forming the Western branch of this river are called Scoudiac, and that the branch which runs Northward is called Cheputnatekook. In this respect also there is a striking resemblance between this and many other rivers upon this Coast, in having its source in Ponds or Lakes.^a

But in confirmation of what has been already advanced, respecting the source of the river in the present instance, it will be proper in this place to attend to the expressions respecting it in the second article of the Treaty of Peace, and to the rules and principles founded in reason and convenience and conformable to the Law and practise of Nations which are usually adopted in cases of this kind in settling boundaries between different States and Empires.

Expressions in
Treaty of Peace

The words in the Treaty are, "East, by a line to be drawn along the middle of the river St. Croix, from its mouth in the Bay of Fundy to its source, and from its source directly north to the aforesaid highlands, &c." If the meaning of the word source, when applied to a river, as indicative of the furthest spring, fountain, or head from whence the waters of that river first proceed or flow, were not accurately defined in the English language, so as not to admit of a different construction, we have seen that on the present occasion the grant to Sir William Alexander has expressly recognized and adopted that definition in terms the most forcible and appropriate; and the Treaty evidently contemplated the source of the river St. Croix, as being at a considerable distance Westward of its mouth. This may fairly be inferred from the whole tenor of the description therein given of the eastern boundary of the United States, so manifestly copied from the ancient western boundary of Nova Scotia. And that this is the true construction, and must have been the intention of the second article of the Treaty of Peace is further confirmed by the provision made in the

^a "The head of Newickwawanick, is in a pond 40 miles nearly from the Sea." This is a continuation of Piscataqua river, and is the main branch. Sullivan's history, page 19 to 22.

"The river of Great Ossipee coming from another pond in New Hampshire, swells the Saco, and impels its course." *Ib.* page 25.

"The Sabastacook comes from lakes nearly north from its mouth; and in its windings receives brooks and small rivers for the space of 150 miles." *Ibid.* page 32.

"The eastern branch of Kenebeck . . . issues from a body of waters . . . called Moose Pond or Moose Lake." *Ibid.* page 33.

"Sheepscott River . . . issues from Ponds about 25 miles from the head of the tide." *Ibid.* page 34.

"The river of Pemaquid . . . is supplied by ponds which lie within 30 miles of the sea. . . . At the distance of 15 miles from the sea, we meet the fall which terminates the navigation." *Ibid.* page 35.

fifth article of the treaty under which this honorable Board is formed, directing that the declaration of the Commissioners, deciding what river is the river St. Croix intended by the former treaty shall not only, "contain a description of the said river but shall particularize the latitude and longitude of its mouth and of its source." For unless the difference of those respective longitudes had been supposed to be considerable, this direction for ascertaining them could not have occurred, as at all necessary or important. The Agent of the United States, however, has stated the fourth and last part of his argument to be grounded on the following position, that, "the head of the tide is the source of the river within the meaning of the Treaty of 1783.^a The distance between the meridians of the mouth, and of the source of the river Scoudiac under this idea would not be more than eight or nine English miles, and of the river Magaguadavic, not more than three or four. It cannot be reasonably supposed, that in any treaty respecting boundaries, it was ever in contemplation to direct the ascertaining such considerable differences of longitude as either of these. And as to the head of the tide, at whatever distance that might be, from the mouth of the river, had such an idea been entertained, at the time of making the Treaty of Peace, it may be fairly presumed, that the boundary would have been made to follow the river no further than to that head and thence to run North to the highlands; instead of which it is expressly to be traced, as in the grant to Sir William Alexander, "to the source of the river and from its source to those highlands."

That by the source of the river St. Croix is intended the remotest head or Spring from whence its waters first proceed, is also to be inferred from the meaning of the same word in other parts of the same treaty, for it will not be contended that the word can be made use of in different senses in the same treaty, without a distinct specification in the treaty, of the sense in which it is used, or a manifest intention that it should be understood in a different sense. ^b In the eighth article of the Treaty of Peace in 1783 it is provided that

Remotest Head or
Spring intended

The navigation of the river Mississippi, from its source to the Ocean, shall for ever remain free and open to the subjects of Great Britain, and the citizens of the United States.

^a This fourth part has been since given up, the statement of it appears in the Appendix page 51. [The appendices are not given.]

^b "The interpretation [of treaties] ought to be made in such a manner that all the parts appear consonant to each other, that what follows agrees with what went before; at least if it doth not manifestly appear that by the last clauses something is changed which went before." [Vattel, B. 2, C. 17, Sect. 286.]

And in the fourth article of the Treaty of Amity, Provisions of Jay
commerce, and navigation, it is provided as follows: Treaty as to the
Mississippi

Whereas it is uncertain whether the river Mississippi extends so far to the northward as to be intersected by a line to be drawn due west from the Lake of the Woods, in the manner mentioned in the treaty of peace between His Majesty and the United States: it is agreed that measures shall be taken in concert between His Majesty's Government in America and the Government of the United States, for making a joint survey of the said river from one degree of latitude below the falls of St. Anthony,^a to the principal source or sources of the said river, and also of the parts adjacent thereto; and that if, on the result of such survey, it should appear that the said river would not be intersected by such a line as is above mentioned, the two parties will thereupon proceed, by amicable negotiation, to regulate the boundary line in that quarter, as well as all other points to be adjusted between the said parties, according to justice and mutual convenience, and in conformity to the intent of the said treaty.

There can be no doubt that by the source of the Mississippi is intended its remotest head or spring, and there is no reason for giving a different meaning to the word in another article of the same Treaty where the source of the river St. Croix is mentioned.

But in the last recited article of the Treaty of Amity, Commerce, and Navigation we find the true principle of the Law of Nations, recognized for interpretation of treaties in instances of this nature; "that the several points are to be adjusted according to justice and mutual convenience, and in conformity to the intent of the treaty."

The most accustomed and convenient rule in cases of this kind is to leave to each power respectively, the sources of those rivers that empty themselves, or whose mouths are within its Territory upon the Sea Coast, if it can be done consistently with, or in conformity to the intent of the treaty.^b

Rule of treaty
interpretation

If it can be shewn that this rule in the present case can be adopted consistently with what has been shewn to be the intent of the treaty, it will form an unanswerable argument in favour of a compliance

^a The falls of St. Anthony are not less than 1800 miles from the Mouth of Mississippi.

^b "Dans de pareils cas, la règle la plus usitée, et la plus convenable, est d'étendre les limites, dans l'intérieur des terres, jusqu'à la source des rivières qui se déchargent à la côte, c'est-à-dire, que chaque nation a de son côté les eaux pendantes; c'est ainsi qu'on en a usé à la paix des Pyrénées, pour fixer les limites entre la France et l'Espagne." *Mem^o. Eng. & Fr. Com.* page 184.

In such cases the most accustomed & most convenient rule is to extend the limits into the Interior of the Countries to the sources of the rivers which discharge themselves at the coast, that is to say that each Nation should have within its own limits the appurtenant waters. This was done at the Peace of the Pyrenees in fixing the limits betwixt France and Spain.

with the rule, more especially if a different construction will involve the inconveniences intended to be avoided by so just a principle of interpretation.

Let us in this view attend to the words made use of in the treaty describing the first station or boundary from which all the other boundaries of the United States are to be traced, viz—"From the northwest angle of Nova Scotia, viz. That angle which is formed by a line drawn due north from the source of St. Croix river to the highlands which divide those rivers that empty themselves into the River St. Lawrence, from those which fall into the Atlantic Ocean."

^a It appears by a map accurately compiled in most instances from actual surveys, an authentic copy of which is now before the Board, that a line drawn due north from the source of the Cheputnatekook river or northern branch of the river Scoudiac or St. Croix will not intersect the highlands here described, but will intersect the river Restigouche which empties itself into the bay of Chaleurs, which falls into the gulph of St. Lawrence, and will also intersect the Metabediac Lake which is the head or source of a river likewise falling into the Bay of Chaleurs. In addition therefore to the argument drawn from the inconvenience resulting from its cutting off the sources of these rivers which discharge themselves within the British Territory upon the Sea Coast; the source of this branch of the Scoudiac or St. Croix, cannot be the source intended by the Treaty of Peace, because in such case we cannot arrive at the north west angle of Nova Scotia, which is the first bound or station upon which the other boundaries depend, as they must be traced from thence, that is to say, "that angle which is formed by a line drawn due North from the source of St. Croix river to the highlands which divide those rivers that empty themselves into the river St. Lawrence from those which fall into the Atlantic Ocean." For if the fact be as above stated, should a line be traced due North from the source of the Cheputnatekook, if the highlands in such case are on this side, or to the Southward of the river Ristigouche, they will divide the rivers that fall into the Atlantic Ocean or Bay of Fundy, from those which fall into the Gulph of St. Lawrence; if they are between the river Ristegouche and the Metabediac lake they will divide the rivers which from different sources unite and fall into the gulph of St. Lawrence; if they are beyond this Lake they will divide the rivers which fall into the *gulph* of *St. Lawrence* from those which

^a The Cheputnatekook river in this map is not laid down from an actual survey but sketched from the information of the Indians and hunters, which it is presumed is not very incorrect, the weight of this part of the argument must therefore so far as it respects the Cheputnatekook depend upon the accuracy of this sketch which cannot be ascertained till the surveys are completed.

fall into the *River St. Lawrence*; the requisite angle therefore will not be found upon this line. But if a line is traced due north from the source of the western or main branch of the river Scoudiac or St. Croix, it will run to the westward of the sources of all the rivers that fall into the Gulph of St. Lawrence and will strike the highlands which divide the rivers that fall into the Atlantic Ocean from those which empty themselves into the river St. Lawrence and consequently give the requisite angle or first bound.

There is certainly a clear distinction in the grant to Sir William Alexander between the river St. Lawrence and the gulph of St. Lawrence or rather of Canada; the boundary line by this grant, after striking that river, is to follow the courses of it Eastward to Gaspee, which lies to the northward of the Bay of Chaleurs, and afterwards the gulph is mentioned, and the words made use of in the grant seem to import a considerable distance Eastward, between the line where it strikes the river of Canada, or St. Lawrence, and Gaspee.

It is far from being certain that the ridge of highlands which divides the rivers that empty themselves into the river St. Lawrence from those which fall into the Atlantic Ocean, is continued to the eastward of the sources of the rivers which fall into the gulph of St. Lawrence, but whether thus continued or not, the inference is clear from the foregoing facts and reasoning, that neither the Cheputnatekook, nor consequently the Magaguadavic or any other river whose source is eastward of the source of the Cheputnatekook, can be the river intended under the name of the river St. Croix in the Treaty of Peace.

But, to apply these facts to the point more immediately under consideration, whether a line due north from the source of the western or main branch of the river Scoudiac or St. Croix, will leave to each of the parties to the treaty the sources of those rivers that empty themselves, or whose mouths are, within its Territory upon the Sea Coast, respectively:

The effect so far as regards the United States is completely secured by the treaty in all events, and thence we have further reason to suppose it was intended to be reciprocal in this respect, if a just interpretation will warrant it. A line due North from the source of the western or main branch of the Scoudiac or St. Croix, will fully secure this effect to the United States in every instance, and also to Great Britain, in all instances except in that of the river St. John, wherein it becomes *impossible*, by reason that the source of this river is to the westward, not only of the Western boundary line of Nova Scotia, but of the sources of the Penobscot, and even of the Kennebeck, so that this North line must of necessity cross the river St. John; but it will cross

it in a part of it almost at the foot of the highlands, and where it ceases to be navigable. But if a North line is traced from the source of the Cheputnatekook, it will not only cross the river St. John, within about fifty miles from Fredericton the Metropolis of New Brunswick, but will cut off the sources of the rivers which fall into the Bay of Chaleurs if not of many others, probably the Miramichi, among them which fall into the gulph of St. Lawrence, and thereby be productive of inconvenient consequences to the two powers, if not of contention between them, instead of "terminating their differences in such a manner, as may be best calculated to produce mutual satisfaction and good understanding," which is one of the principal and avowed objects of the treaty.

Had the treaty intended that this North line should intersect a number of rivers which empty their waters through a British Province into the Sea a right of navigation or passage down those rivers would doubtless have been secured to the United States by the treaty; That this was not the intention of the treaty not only appears from the facts and reasoning that have been already adduced, but from a further consideration that in most, if not all the maps of the interior country published before the year 1783, although the courses of the river St. Croix are very inaccurately laid down, still it is very uniformly made to terminate in a Lake near the eastern branch of the river Penobscot, and a line drawn North from that termination upon those maps will not intersect any of the rivers which empty themselves into the Sea to the eastward of the mouth of the river St. Croix, except the river St. John.^a This furnishes an unanswerable argument, so far as any fair conclusions can be drawn from those maps, in proof not only that the river Scoudiac is the true ancient river St. Croix, and consequently intended by the Treaty of Peace, under the name of St. Croix, but that its true source is upon the western branch in a Lake, near to an eastern branch of the river Penobscot.

If then there were any doubt remaining which was the true source of the river St. Croix from which the line due North to the highlands

^a There seems to have been a strong reliance placed upon the validity of this argument by the author of "The History of the District of Maine," as in the map annexed to that work, a line due North from the source of the river Magaguadavic is made to cross no other river but the river St. John, and to pass to the westward of the sources of all the rivers that empty themselves into the Bay of Chaleurs or gulph of St. Lawrence, when in fact a line due North from the Magaguadavic will intersect them all. Vide Map N^o. 16. [No attempt has been made to identify the maps by means of the numbers given to them from time to time by the Agents. In the present instance this identification is clear, but it appears that both Agents from time to time changed the numbering of the maps, so that any effort to make an identification in each instance would be illusory.—EDITOR.]

is to be traced, the inconveniences abovementioned would form the strongest argument against a decision from which they would result, and in favour of that by which they will be avoided; much more so, when the latter decision will correspond with, and be supported by so many other incontestible proofs and arguments, clearly establishing the river Scoudiac to the source of its western branch, to be the river St. Croix truly intended under that name, in the Treaty of Peace and forming a part of the boundary therein described; and the Northwest angle of Nova Scotia mentioned in the same Treaty to be formed by a line drawn due North from that source to the highlands, described in the treaty.

Whether therefore we follow the words of the grant to Sir William Alexander, by which we must be at all events concluded; or follow the main branch of the river, retaining the same name; or are governed by the uniform decision of geographers and historians of credit upon the subject, and the rules and principles of the Law of Nations for the interpretation of treaties, we shall be led to the same place as the source of the river from which the line due North must be traced to the Northwest angle of Nova-Scotia.

But even if it had not been known at the time of the grant to Sir W^m Alexander, that this river had two branches, and the grant had been expressed generally, to the furthest source of the river St. Croix, still the main branch, or that retaining the name of the river at its mouth, must have been followed to its source, not only to satisfy the words of the grant, but to give it its intended construction and operation.

It clearly appears to have been the intention of the grant, to give as large a territory to be erected into the Province of Nova Scotia as the river St. Croix could give by tracing a line due North from its source to the great river Canada, and it is expressly provided in the grant, contrary to the general rule for the construction of the King's grants, that, "if any questions or doubts should thereafter arise, upon the interpretation or construction, of any clause contained in the grant, that they should all be taken and interpreted, in the most extensive sense, and in favour of the said Sir William Alexander."^a

Having traced the original boundaries of the Province of Nova Scotia to the furthest source or spring of the river St. Croix upon the western branch thereof, and thereby found the utmost western limit of the Province, it remains only to discover its utmost Northern limit, in order to ascertain the northwest angle we are in search of.

The northwest
angle of Nova
Scotia.

^a Vide Memorial of Claim by his Majesty's Agent. [Supra, 36.]

The Province of Nova Scotia at the time of the treaty in 1783 was, as has already appeared, bounded to the northward by the southern boundary of the Province of Quebec, which boundary was established by the Royal Proclamation of the 7th October 1763 and confirmed by the Act of the 14 Geo 3, c. 83, passed in the same year with the Act of Parliament already cited, by which it is enacted, "that all the territories, Islands, and countries in North-America, belonging to the Crown of Great Britain, bounded on the South by a line from the Bay of Chaleurs along the highlands which divide the rivers that empty themselves into the river St. Lawrence, from those which fall into the Sea to a point, in forty five degrees of Northern Latitude on the Eastern bank of the river Connecticut &c^a, be annexed to, and made a part and parcel of the Province of Quebec."^a

As then at the Treaty of Peace in 1783 the northern limit of the Province of Nova Scotia, was, "a line along the highlands which divide the rivers that empty themselves into the river St. Lawrence from those which fall into the Sea," it unquestionably follows that the northwest angle of Nova Scotia, at the time of the Treaty of Peace in 1783, was that angle which was formed by a line drawn due north from the source of the river St. Croix to those highlands. If we now compare this angle, with the northwest angle of Nova Scotia, described in the Treaty of Peace, viz., that angle which is formed by a line drawn due North from the source of St. Croix river to the same highlands, can it be said with any degree of propriety, that^b "the limits and boundaries of the Province of Nova Scotia were unknown at the time of the Treaty of Peace in 1783, and that it therefore became necessary to give it a western boundary by the treaty itself in these words, to wit, *that angle which is formed by a line due North from the source of the river St. Croix to the highlands*"?

Can it be believed, or for a moment imagined, that in the course of human events, so exact a coincidence could have happened, between the actual real boundaries of the Province of Nova Scotia, and the boundaries of it described in this treaty, if the latter had not been dictated and regulated by the former?

Can any man hesitate to say, he is convinced that the Commissioners at Paris in 1783, in forming the 2^d article of the Treaty of Peace, in which they have so exactly described this northwest angle, had reference to, and were governed by the boundaries of Nova Scotia, as described in grant to Sir W^m Alexander and the subsequent alteration of the Northern boundary by the erection of the Province of Quebec?

^a Vide ante, page 9. [Supra, 172.]

^b Vide Mr Sullivan's argument, part 1, Sect. 53. [Supra, 105.]

Will not this conviction become irresistible when he adverts to the reservation made to his Majesty in this article of the treaty, "of such Islands, as then were, or theretofore had been within the limits of the said Province of Nova-Scotia"?—which clearly alludes to the ancient limits of the Province of Nova Scotia, and to the Islands included and comprehended within those limits as described in the grant to Sir William Alexander; some of which might have belonged to the United States, as lying within the limits of those States, but for the exception of them in the treaty.

Let us now compare the western boundaries of the Province of Nova Scotia granted to Sir W^m Alexander, with the corresponding eastern boundaries of the United States. As the river St. Croix is not included in the Grant to Sir W^m Alexander, as stated by the Agent of the United States;^a and as it was not intended to be included, because, as has been made to appear, this river St. Croix was an agreed boundary between the Province of Nova Scotia erected by this grant, and the Territory of New England, granted to the grand Council of Plymouth, it follows that the line of this grant to Sir William Alexander must legally be construed to run through the middle of the river, the river not being assigned inclusively to either Territory.

Comparison of
boundaries of
Nova Scotia and
United States

Upon this principle then, this part of the western boundaries of the Province of Nova Scotia in the grant to Sir William Alexander will be a north line, across the mouth of the Bay of Fundy to the river commonly called by the name of the St. Croix, and through the middle of the same, to the furthest source or spring upon the western branch thereof, including and comprehending all Islands within six leagues to the westward, northward, and eastward, and within forty leagues to the southward of any part of the premises described in the grant.

And the corresponding eastern boundary of the United States by the second article of the Treaty of Peace, is,—“a line to be drawn along the middle of the river St. Croix, from its mouth in the bay of Fundy to its source including such Islands as then were, or theretofore had been within the limits of the said Province of Nova Scotia”; referring to the Province of Nova Scotia, of which the Northwest angle before described was made the first station or boundary, from which the other boundaries of the United States were traced.

As it has been already shewn that the source of this river St. Croix, otherwise called Scoudiac, upon the western branch, and¹ near to a branch of the Penobscot to which there is a portage or carrying place

^a Vide Mr. Sullivan's argument, part 1, sect. 57. [Supra, 108.]

¹ That the word “and” here is a copyist's error, and should be “is,” will be evident to those who have followed Mr. Chipman's argument.—EDITOR.

from it; the same place is evidently contemplated as the source from which the line due North to the highlands is to be drawn, both in the grant to Sir W^m Alexander, and in the second article of the Treaty of Peace, and consequently this part of the western boundary of Nova Scotia in the grant is precisely the same with the corresponding eastern boundary of the United States in the Treaty.

Thus the first principle stated in this argument is established beyond all contradiction:

That by the second article of the Treaty of Peace, it was intended that no part of the Province of Nova Scotia should be thereby ceded to the United States, but that the Province of Nova Scotia, according to its ancient limits, should be and remain a part of the territories and dominions of his Majesty, as his Majesty had before that time held and possessed the same.

And this principle being established, the necessity of examining into, and ascertaining precisely the ancient boundaries of the Province of Nova Scotia, in the manner that it has been done, is clear and obvious and the result of that examination, compared with the boundaries in the Treaty of Peace, thus serves in its turn to confirm the principle.

This principle being evident from the words of the Treaty of Peace itself, no explanation of the treaty by either party, inconsistent with this true and obvious intention of it, can be received consistently with any of the rules and principles of the Laws of Nations universally acknowledged and admitted as obligatory in such cases, as has been already made to appear, and will be more fully shewn in a more particular reply to the arguments advanced in support of the claim of the United States.

From the foregoing facts and arguments the underwritten Agent feels himself warranted in concluding that the river Scoudiac is the river truly intended under the name of the river St. Croix in the Treaty of Peace and forming a part of the boundary therein described; and that the northwest angle of Nova Scotia intended by the treaty is that angle which is formed by a line drawn due north from the furthest source or spring of the western or main branch of the river Scoudiac, to the highlands described in the treaty.

As the final declaration to be made by this honorable Board, deciding what river is the river St. Croix intended by the Treaty of Peace, must particularize the Latitude and Longitude of its mouth as well as of its source, it may be proper and perhaps necessary in this place to say a few words, respecting the mouth of the river Scoudiac, which has been so fully proved to be the river St. Croix intended by the treaty.

The mouth of
the Scoudiac

By an inspection of the plan of the surveys now before the Board, it will appear, in conformity to Champlain's authority, that its proper mouth, is where it emptys itself into that part of Passamaquady Bay, which was formerly called the Bay of St. Croix, and is now called St. Andrew's Bay; and this mouth is traversed by a line drawn from the north point of St. Andrew's Harbour, commonly called Joe's Point, across the river to the opposite point upon the western shore near to the place where Mr Brewer now lives. In confirmation of this, the Indians produced and examined before the Board as witnesses on the part of the United States, have testified, that from Brewer's upwards the waters are called Scoudiac; and from thence downwards, Passamaquady Bay.

And the author of the History of the District of Maine ^a also speaks of the proper mouth of this river as being at, or near St. Andrews, where he says, "the English now possess the country as far west as the east bank of the Schooduck, at its mouth."

It being established that the river Scoudiac, under the name of the river St. Croix, made a part of the original boundaries of the Province of Nova Scotia, and continued to be a part of its western boundary at the time of the Treaty of Peace in 1783, it may be proper now to enquire whether that Province has in fact exercised its jurisdiction agreeably to those limits: and to ascertain this fact, as far as it regards this western boundary, we can go no further back, with any degree of accuracy, than the Treaty of Peace in 1763; for previous to the war, immediately preceding that period, this part of Nova Scotia or Acadie had been with little interruption in the hands of the French, notwithstanding the Treaty of Utrecht by which it was fully ceded to Great Britain.

The whole country coming into the possession of his Britannic Majesty by the Treaty of 1763, we are from thence to date our enquiries respecting the jurisdiction in fact exercised over this part of the Country down to the Peace in 1783.

The boundaries of the Province of Nova Scotia, as described in the Commissions to the Governors of it from his Majesty during that period, conformed as we have seen to the boundaries of it as described in the grant to Sir W^m Alexander without any material variation, except the alteration of its northern limits occasioned by the erection of the Province of Quebec.

Agreeably to these boundaries we find the following grants to have been made under the Seal of that Province.^b

^a Vide Sullivan's History, page 40.

^b Vide Appendix, page 35. [The appendices are not given.]

Grants of land 1. A grant dated the 18th of October 1765 of Perkins' Island in Passimaquady bay to Thomas Falconer and others now called Indian Island.

2. A grant dated 30th October 1765 to Francis Bernard and others of 100,000 Acres of land, including Moose Island and St. Croix Island, now called Dudley Island, which will be presently explained.

3. A grant dated in the year 1767, to John Tucker Esq^r of 20,000 Acres principally lying on the North side of the river Scoudiac, about six miles above Aoulk, or Oak Bay.

4. A grant dated 30th September 1767 to W^m Owen and others of Passimaquady outer Island (now called Campo Bello) bounded on the South East by the Bay of Fundy, on the Northwest by Passimaquady harbour, and the Southwest by Passimaquady western harbour, on the North East by Passimaquady Bay. Possession is still held under this grant.

5. A grant dated in the same year to Joseph Gorham of Deer Island in Passimaquady Bay. Possession is still held under this Grant.

6. A grant to Joseph William Gorham in the same year of 10,000 Acres, lying at the head of Aoulk or Oak Bay.

7. A grant to William Gorham in the same year of 10,000 Acres adjoining the former grant, and extending upon the East side of the river Scoudiac down to St. Andrew's Point, opposite to St. Andrew's Island.

8. A grant dated in the same year to Augustine Oldham of 10,000 Acres, one half thereof lying on the Western side of the Magaguadavic.

9. A grant in the same year to Edward Crosley of 10,000 Acres, one half thereof lying on the Western side of the Magaguadavic, this river running through the center of the two Grants last mentioned.

10. A grant to J Boyd in the same year of 1000 Acres, lying between the Scoudiac and Magaguadavic rivers.

11. A grant dated 26 June 1771 to William Owen Esq^r of an Island in Passimaquady Bay, lying and bearing North North West from the North East end of Passimaquady outer Island, about three quarters of a mile distant therefrom, also a small rocky Island called Gull Island, lying contiguous to the other—also one other small Island, to the Westward of Gull Island, commonly called and known by the name of Casco Bay Island. Possession is still held under this Grant.

12. A grant in the year 1774 to Thomas Farrel of 200 Acres upon the Diggedegwash river—lying between the rivers Scoudiac and Magaguadavic.

A plan of these Grants is now before this Board.^a During the same period there were granted under the seal of the Province of Nova Scotia many Townships, and large tracts of land on the North side of the Bay of Fundy, exclusive of those above specified; most of these grants were escheated for nonperformance of the conditions upon which they were held, and the lands have since been re-granted by the Crown to others.

Thus it appears that a great proportion of the land near the shores of the bay, between the rivers Scoudiac, or St. Croix, and Magaguadavic, and all the Islands in the bay of any considerable magnitude or consequence, were not only (with the other Islands in the bay, and the residue of the land between those rivers) within the limits of the Province of Nova Scotia, but were actually granted under the seal of that Province by the Crown before the year 1775.

In addition to this evidence, the underwritten Agent is prepared to establish the following facts, by witnesses to be produced before this honorable Board:

That from the year 1770 to the year 1775, Courts of General Sessions of the Peace were held by Commission from his Majesty under the authority of the Government of Nova Scotia upon the Island of Campo Bello, and that the dockets and records of that Court were, with several other books and papers, taken from the possession of a Magistrate there, then having custody of the same, by an American Privateer in the year 1778; that while these Courts were held on Campo Bello Island during the period above mentioned, Moose Island, Deer Island, Indian Island, and all the other Islands in the Bay of Passimaquady, were within the Jurisdiction of the Province of Nova Scotia. That not only all the Inhabitants upon the Islands in this bay, but those upon Passimaquady or Copskook river, and all who resided within several miles westward of Moose Island, were always considered, and always acknowledged themselves as being within the Jurisdiction of the Province of Nova Scotia; that they were regularly summoned and attended the different Courts thus held upon the Island of Campo Bello, and that one who was an Inhabitant of Moose Island at that time, and still continues to reside there, was appointed the Deputy Provost Marshal for the District of Passimaquady, who was sworn into Office, and held and executed the same till a stop was put to all Judicial proceedings in 1775. That during all this time the Government of Massachusetts Bay never claimed or exercised any Jurisdiction over the Inhabitants of this District, that no Officers were appointed within it

Exercise of
judicial power

^a Vide map N^o 16.

under that Government, and that when any of the Inhabitants of the Massachusetts Bay were aggrieved, they applied for redress to the Laws of Nova Scotia.^a

Such complete evidence of possession added to such proofs of the original title, as have been adduced in support of his Majesty's claim would be sufficient in any Court of Law within his Majesty's dominions, and it is presumed within the United States also, in an action of ejectment to recover property claimed, did the whole country belong to either of these powers, and a plaintiff having equal title and equal proofs were to bring a suit against a defendant, claiming a title to the premises on no better grounds than the United States rely upon in the present instance.

It will now be explained how it happened that the Province of Nova Scotia exercised Jurisdiction beyond or to the Westward of the river Scoudiac or St. Croix, now claimed and proved to be the real boundary of that Province, premising that having exceeded the boundary in any instance can no more affect the title to that part of the country, which is within the real boundary, than a man's enclosing thro' a mistake of land marks a part of his neighbour's field with his own, can destroy or lessen his title to that which is really within his own legal bounds.

It is in the first place to be observed, that there is but one instance in which any grant has been passed, under the seal of the Province of Nova Scotia, of lands out of its Jurisdiction, or lying Westward of the Scoudiac, the true river St. Croix, and that this is the very first grant that was made of lands lying upon the main in this part of the Province, being the grant to Francis Bernard, and others before mentioned dated the 30th September, 1765, of 100,000 Acres of land including Moose Island and Saint Croix (since called Dudley) Island.

Upon the Peace of 1763, and the subsequent order of his Majesty in Council to the Governor of the Province of Nova Scotia to grant the lands within the Province to encourage settlements there, great pains were taken to ascertain the true ancient river St. Croix, the western boundary of Nova Scotia, from the descriptions given of it by the French and other historians. Governor Bernard as has been before observed being desirous to obtain a grant of lands for himself and associates, indisputably within the Province of Nova Scotia^b for the reasons which have been mentioned, sent surveyors in the year 1764, with the orders or instructions which have been already

^a Vide Mr Curry's affidavit in the appendix, page 69. [The appendices are not given.]

^b Sullivan's History, page 41.

under consideration to survey the rivers St. Croix and Passamaquady; the latter of which, agreeably to all the maps then extant, he considered as lying westward of the former, and framed his instructions accordingly; and in those instructions as has been fully stated, and as may be seen by recurring to them, followed the description of the river St. Croix as given by Champlain which has been proved to be the Scoudiac. These instructions it appears by the Deposition annexed to the Copy of them of John Mitchel the principal surveyor sworn on the 16th September 1790, were given to him by Governour Bernard for his direction in the survey of Passamaquady Bay in the year 1764, and he swears that "this deposition contains the whole truth on the subject to which it relates."

The Instructions were beyond all doubt very pertinent and proper for the purpose for which they were given, the surveying & ascertaining the true ancient river St. Croix, the original western boundary of the Province of Nova Scotia, its courses and extent. Mitchel's deposition of 1784

Notwithstanding this deposition made by M^r John Mitchel in the year 1790, another deposition appears to have been made by him on the 9th of October 1784, a copy of which has been communicated to the underwritten Agent by the Agent of the United States, in which this same M^r Mitchel swears in the words following:

I the subscriber an Inhabitant of Chester in the State of New Hampshire voluntarily make the following declaration to wit:

That I was employed by his Excellency Francis Bernard Esq^r, Governor of the Province of Massachusetts Bay in April 1764, as a surveyor in company with M^r Israel Jones as my Deputy, M^r Nathan Jones as Commanding Officer of a party of Troops, and Captain Fletcher as Indian Interpreter, to repair to the Bay of Passamaquady, to assemble the Indians usually residing there, and from them to ascertain the river known by the name of St. Croix. We accordingly assembled upwards of forty of the principal Indians upon an Island then called L'Atterail in the Bay of Passamaquady. After having fully and freely conversed with them on the subject of our mission, the Chief commissioned three Indians to shew us the said river St Croix, which is situated near six miles North, and about three degrees East of Harbour L'Tete, and East North East of the bay or river Schuduc, and distant from it about nine miles upon a right line. The aforesaid three Indians after having shewn us the river, and being duly informed of the nature and importance of an oath, did in the most solemn manner depose to the truth of their information respecting the identity of the said river St. Croix^a and that it was the ancient and only river known among them by that name.

^a Named by the Sieur De Monts 180 years before.

We proceeded conformably to this information in our surveys, and in August following I delivered to Governor Bernard three plans of the said river St. Croix, and the bay of Passimaquady.

JOHN MITCHEL

SUFFOLK SS. BOSTON 9th October 1784. The above named John Mitchel personally appeared and on solemn oath declared that the above by him subscribed is true.

Before me—EZEKIEL PRICE *Justice of Peace*

A True Copy—Attest—

JOHN AVERY jun^r *Secretary*

The underwritten Agent will not attempt to reconcile these depositions, nor does he think it necessary upon this occasion to undertake to vindicate Governor Bernard, whose understanding was never called in question, from such singular weakness as would have been imputable to him, had he sent off M^r Mitchel and his party under such Instructions as are contained in the last recited deposition. The written instructions produced in evidence before the Board, under which M^r Mitchel was directed by the Governor to proceed, destroy any such supposition, more especially [as] in them no such order appears, as is stated in this deposition, and M^r Mitchel is merely directed to employ the Indians to assist him in going up the river St. Croix, and from the Pond as its source by the usual portage to the Penobscot.

M^r Mitchel is probably a man advanced in years, and as this deposition, which was taken *ex parte*, was made so many years after the facts testified to, after the Peace in 1783, and subsequent to the commencement of this controversy, many allowances should in candor be made for an indistinct recollection of what had passed so long before; he must at that time have forgot that he had received any written Instructions, as it appears by the affidavit, annexed to the copy of the written Instructions, he seems to have then forgot the contents of this deposition sworn to six years before.

Be this however as it may, it appears by the deposition made in 1784 that M^r Mitchel, disregarding the written orders which in the year 1790 he swears he received from the Governor for his direction in the survey, summoned the Indians to tell him what river he should survey as the ancient St. Croix; and attending to their account, attested to in the most solemn manner he states by three Indians, commissioned by the Chief for that purpose,^a instead of surveying the river St.

Origin of suggestion that Magaquadavie was the St. Croix

^a M^r Mitchel no doubt must have clearly recollected so solemn a part of the transaction as this, but he has omitted to tell us, what person administered the Oaths and under what authority,—*vide* supplemental argument. M^r Mitchel

Croix pointed out in his instructions, from the source of which there was a portage to a branch of the Penobscot, which description applied to the river Scoudiac only of all the rivers that empty themselves into Passimaquady bay, as he might and ought to have learned from the same Indians, he undertakes a survey of the river Magaquadavie, which till then had never been noticed nor probably known by the English; at least there is no written account of it, and it will clearly appear upon examination, that this river is not one of the two rivers laid down in the Maps published before this survey called the Passimaquady and St. Croix.

Here then is the origin of the suggestion that the river Magaquadavie is the great river St. Croix named by the Sieur De Monts in the year 1604, and eminently so called since that time; but so little foundation was there to suppose this obscure and hitherto unknown river to be the true, ancient and only river St. Croix, the boundary between the two Provinces; so totally destitute was it, of all the characteristic marks by which the true river St. Croix is so particularly & certainly pointed out, by the French and other writers of credit who were acquainted with the origin and occasion of the name, that Governor Bernard gave not the smallest heed to the account, easily discerning from his knowledge of the subject that altho' with other rivers emptying into the bay, this river might be known to the Indians by the imperfect traditions among them under the name of St. Croix, it could never be the great river St. Croix, so long known as the original western boundary of the Province of Nova Scotia, and the established boundary between that Province and New England and Massachusetts Bay, and therefore no memorial remains of the transaction.^a

The Surveyor General of Nova Scotia also applied himself at this time under the direction of Governor Wilmot then Governor of that Province to discover which of the rivers emptying themselves into Passimaquady Bay was the true ancient river St. Croix. He was informed also by the Indians, and perhaps the same that were consulted by M^r Mitchel, that the river Copskook or Cobscook was known to them under the name of St. Croix. He probably found that a small Island near the mouth of this river, now called Dudley Island, was by them known under the name of St. Croix Island, that about two leagues up the river there were rapids where the Indians carried their canoes about

Indian testimony
as to Cobscook

must have perfectly understood the Indian Language, to enable him to make this deposition with safety, unless the Indians told their story in English.

^a Vide Morse's Geography, 3^d Edition, 1796, page 380 in notes.

500 paces, and then re-entered the river, and that the river afterwards divided into two branches. Finding that this river agreed in these particulars with the description of the ancient river St. Croix, the original western boundary of the Province of Nova Scotia, he was satisfied with his researches, and reported this river to Governor Wilmot as in his opinion the true ancient river St. Croix.^a

Upon this being made known to Governor Bernard, he applied for and obtained the grant beforementioned, bearing date the 30th October 1765, under the seal of the Province of Nova Scotia, of a tract of land for himself, and Thomas Pownall, John Mitchel and Thomas Thornton, described as follows, to wit:

Action of Governor Bernard

A tract of Land, situate lying and being Beginning at the head of the Western Branch of the River Copskook called the river St. Croix two leagues above the Falls or full Rapids and to run from thence North on the Meridian line or North fourteen degrees East by the Needle Seventeen Miles, thence South sixty-six degrees East till it meets with the Western Branch of the River Scodick and is thence bounded by said River Scodick to the East Bay and by said Bay round into Copskook River through the Falls and up the Western Branch to the first mentioned Boundary together with the Island called Moose Island and the Island called St. Croix Island containing in the whole by Estimation One Hundred Thousand Acres, more or less.

Governor Bernard must have been satisfied that his surveyor Mr Mitchel was mistaken in supposing the Magaguadavic to be the true St. Croix, and that the Copskook was the true ancient St. Croix, or he would never have consented to take a grant bounded upon it as such; and what puts it beyond all doubt, that this river was at that time supposed by all parties to be the river St. Croix, originally so called by De Monts, and made a part of the original boundary of the Province of Nova Scotia in Sir William Alexander's Patent, is the evident reference there is in the grant to the boundaries described in the Patent. The tract begins, "at the head of the western branch of the river Copskook, called the river St. Croix, and to run from thence North on the Meridian line," &c, the precise description used in Sir William Alexander's Patent, and comprehends two of the Islands included in that Patent.^b

^a Vide appendix, page 198. [The appendices are not given. In this paragraph, as found in the State Department copy, I have made these substitutions: In the first line, "also" for "who"; and, in the fifth line from the end, "Finding that this river agreed" for the senseless jumble "Finding this river agree as he that." The original may, however, have been: "Finding this river agreed, as he thought, in these particulars" etc.—EDITOR.]

^b Sullivan's History, page 41.

Notwithstanding the orders of Governor Bernard were so clear and positive to his surveyors in 1764 to survey as the river St. Croix, that river emptying itself into the Passimaquady Bay, from the source of which there is a portage usually made use of by the Indians to an Eastern branch of the river Penobscot, which description is applicable to no other river than the river Scoudiac; yet the Agent of the United States maintains, that <sup>Untenable con-
tention of
American Agent
as to survey of
Magaquadavic</sup> "as soon as the Peace was concluded in 1763, between the English and French Crowns, the government of the Province of Massachusetts Bay asserted its claim to the river Magaquadavic as the river St. Croix" and adduces these very orders of Governor Bernard in support of the assertion.

The underwritten Agent is compelled in his turn to say, he is not fortunate enough at present to comprehend, how this use can be made of these orders or Instructions by the Agent of the United States.

1. Because the orders, even if they had directed a survey of the river Magaquadavic, were not an Act of the government of the Province, but given and intended by Governor Bernard, individually, merely to ascertain that river St. Croix, its courses and extent, which was the ancient western boundary of the Province of Nova Scotia, and consequently the boundary between that Province and Massachusetts Bay, for the purpose of enabling him to obtain from the Governor of the former Province a grant of the Tract of land he wanted for himself and his friends. And

2. Because, instead of directions to survey the river Magaquadavie, the orders were clear and positive to survey the river, of which the source was near the Penobscot, as the river St. Croix.

The Agent of the United States, goes on to say—"Upon these orders, Mitchel, Israel Jones, Nathan Jones, Abraham Duncan and Joseph Bradbury proceeded to the river Magaguadavic." This was singular enough, when they were sent to the river Scoudiac by these very orders. "They examined the native Indians as to the question which was the St. Croix River." There was no authority for this in these orders; "and were by them, acting under the solemnity of an Oath," (which they had no authority to administer) "shewn the river last mentioned [the Magaguadavic] as the river of that name. They surveyed the river accordingly, and made their return to the Government. That return became a matter of record and thereby a matter of public notoriety of course."

NB. The Record of that Report is lost, and must be proved by witnesses.^b

^a Vide Mr Sullivan's argument, part 3, Sect. 18. [Supra, 150.]

^b This section is altered in the Copy filed with the Secretary, and will be noticed in a supplemental argument.

That the persons here named disobeyed these orders and surveyed the river Magaguadavic without orders, is clear; but there is no evidence offered of their having made any return to the Government of the Province about it, nor of their return having become a matter of Record; nor is it easy to conceive how this could have been the case, under all the circumstances of the transaction as they really existed, and have been stated. Had this been a business of the Government of the Province ^a and become a matter of record there, it would have been indeed singular for Governor Bernard in the very next year to apply for and procure his grant from the Province of Nova Scotia, which, if any credit was due to M^r Mitchel's "report or return become a matter of record," must have been null and void, the lands thereby granted, except the Islands,^b not being, according to that record, within the limits or Jurisdiction of the Province of Nova Scotia. Mitchel swears that he delivered to Governor Bernard three plans of the said river St. Croix (Magaguadavic) and of the bay of Passimaquady in August 1764. This it is presumed must be the return spoken of, and if these three plans became a matter of record it is not a little surprising that this Record should be altogether lost. When the existence of it, as a Record of the Government of the Province, and its subsequent loss, shall be proved and accounted for, perhaps it may not be improper to prove the contents of this Record by witnesses.

The Agent of the United States thus concludes his observations upon this part of his Testimony:

This is acknowledged not to be conclusive evidence in a Court of Law, that the river Magaguadavic had always been called the St. Croix, but it is good evidence to prove that the Commissioners agreed upon it as the river St. Croix in 1783— because the report of the surveyors being a matter of public notoriety, led them naturally to fix upon it, as the river known by that name.^c

It is difficult here to distinguish with certainty what is intended by the word "*This*," in the beginning of this sentence. If it refers to the claim of the Government of the Province to the river Magaguadavic

^a "The year before Morris's survey, Bernard had employed Mitchel to survey the country. He procured the affidavit of several Indians, who made oath that the Mackagadawick was always called the St. Croix; but this did not comport with the governour's wishes to obtain a grant." Sullivan's History, page 42. Vide Supp^l argument.

^b These Islands, Moose Island and St. Croix (now called Dudley) Island, were beyond all dispute in fact within the limits of the Province of Nova Scotia, even if the Magaguadavic were the true original great river St. Croix.

^c The Agent of the United States in the Copy of his argument filed after receiving a Copy of this argument has considerably altered this conclusion which will be noticed in a supplemental argument.

as the river St. Croix, evinced by the orders from Governor Bernard to John Mitchel to survey it, which seems to be the ground upon which this piece of evidence was introduced, it is obvious to remark, that as these orders were clear and positive to survey a river answering to the description of the river Scoudiac, and not the Magaguadavic, it follows that this evidence, if admissible at all, goes to prove that the Commissioners agreed upon the river Scoudiac, as the river St. Croix in 1783.

But, if by the word "*This*," is intended M^r Mitchel's return, or the plan of this survey, delivered to Governor Bernard, founded upon the Indian story which Governor Bernard thought undeserving any attention, it can scarcely be presumed that the Commissioners in 1783, if they had seen this plan, (as seems to be supposed by the Agent of the United States, from its being a matter of such public notoriety, and which is since lost) could have considered *this* as good evidence to prove that the river Magaguadavic was the Great ancient river St. Croix, the original western boundary of the Province of Nova Scotia, and the established boundary between that Province and the Province of Massachusetts Bay.

For it must be remarked here that it appears from this, and every other part of the Testimony, relied upon by the Agent of the United States in support of his position "that the river intended by the Commissioners in 1783 is the river by the Indian Natives called the Magaguadavic," that this position is maintained and insisted upon evidently upon the ground, and under the idea, that the river Magaguadavic is, as M^r Mitchel swears the Indians stated it to be, the true ancient and only river known by the name of St. Croix, eminently so called; so that the question must after all be determined, even upon the system adopted by the Agent of the United States, by ascertaining which of the rivers in controversy agrees with the descriptions given of the great river St. Croix, in the histories of L'Escarbot, Champlain, De Laet, and other writers of credit and authenticity, which is a point that the underwritten Agent flatters himself has been established beyond all contradiction in favour of the river Scoudiac.

But with respect to the last recited observations of the Agent of the United States, upon the Article of evidence now under consideration, the underwritten Agent fully agrees with him that "it is not conclusive testimony in a Court of Law, that the river Magaguadavic had always been called the river St. Croix," and he further contends that from all the testimony produced in this cause, and the circumstances attending this survey of M^r Mitchel's, *the presumption is violent* that neither Governor Bernard, nor any other person ever thought of this

river, as the true ancient great river St. Croix, the original western boundary between that Province and Massachusetts Bay, till after the peace in 1783.

^a The Agent of the United States informs us, that "early in the year 1784 the General Court of Massachusetts passed an act, requesting the Governor there to appoint Commissioners to proceed to Passimaquady, and to enquire into the encroachments which had been made by the subjects of his Britannic Majesty on the lands of the State.

Report of commissioners
Lincoln, Knox and
Partridge, 1784

Whereupon Benjamin Lincoln, Henry Knox and George Partridge Esquires, were by the Governor with the advice of the Council appointed on the Commission," and that—"the Commission could not but derive great importance from the solemnity of the measure, as well as from the characters which filled it."

The report of two of those Commissioners who executed the Trust, so far as is pertinent to the present occasion, is in the following words:

BOSTON, 19th October 1784

SIR. In obedience to your Excellency's commission bearing date July 12, 1784, the subscribers, two of the Commissioners named therein, proceeded the latter end of August to the Bay of Passimaquady, and there endeavoured to inform themselves of what encroachments had been made by the subjects of his Britannic Majesty on the Territories of this Commonwealth.

They beg leave to inform your Excellency that a very considerable number of British subjects are settled at a place called St. Andrews, on the Eastern bank of the river Shudac, which, in the opinion of your Commissioners, is clearly within the limits of this State.

By your Excellency's leave, they will recite a short state of facts, on which this opinion was formed.

There are three very considerable rivers which empty themselves into the Bay of Passimaquady, which is from five to seven leagues wide. The eastern river falls into the Bay about a league from the head of it;^b and perpendicular to the Eastern side. The middle river falls into the Bay, far on the Westerly side of it, and in a direction parallel therewith. The western river falls into the Bay, about six leagues from the head of it, on the Westerly side, and nearly perpendicular to it, all of which in late British Maps, are called St. Croix.^c

The first is by the Indians called Magaguadavic, the second Shudac, and the third Cobbeseekook.

^a Vide his argument, part 3, Sect. 31. [Supra, 164.]

^b The Agent of the United States differs with the Commissioners as to the head of the bay, he places it above the Devil's, or D'Orville's head where the river Scodiac runs down from the Westward. Vide his arg^t. part 3, Sect. 9. [Supra, 140.]

^c These maps must probably have been published before the Peace in 1783.

Dressée sur les Manuscrits du Depot
des Cartes et Plans de la Marine.

1-11



(In *Charlevoix, Histoire et description générale de la Nouvelle France*. Paris, 1744.)

From every information the subscribers could obtain on an enquiry of Indians and others,^a the eastern River, was the original St Croix. This is about three leagues East of St Andrews where the British inhabitants have made a settlement.

Soon after the subscribers received their Commission they wrote to Mr Jay, requesting him to give them information whether the Commissioners for negotiating the Peace confined themselves in tracing the boundaries of the United States, to any particular Map, and if any to what. Since their return they received his answer, mentioning that Mitchell's map was the only one the Commissioners used, and on that they traced the boundaries agreed to. This in the opinion of the subscribers is a fact which must facilitate an equitable decision of the matter, though Mitchell's Map is not accurate, at least in the description of the Eastern part of this State.

He has described but two, instead of three rivers, which empty themselves into the Bay of Passimaquady. The eastern of them he has placed at the head of the bay near the centre of it, and calls it the St Croix.^b The western river he has called by the name of Passimaquady. Hence it is plain that though the Map is inaccurate, yet the eastern river which empties itself into the Bay is in the opinion of Mitchell the St. Croix. This opinion is further supported by the deposition of Mr Mitchel,^c accompanying this Report.

The subscribers further represent, that they find in the Maps of a Quarto Volume published in Paris in 1744, from Charlevoix's voyages to North America made in 1604, two rivers delineated at the head of the Bay of Passimaquady, the western of which is called the Passimaquady, the eastern St. Croix.^d

Although the mouth of the river St. Croix is but little more than three leagues East of the banks of the Shuduc on which the British Subjects are settled, yet, from the different courses of the two rivers, the source of the western branch of the Shudac is nearly one hundred miles from the source of the St. Croix.

It is remarkable that in this Report these Commissioners, who were in Boston when they made it, do not appear to have had any

^a It is presumed no British Subjects were examined upon this occasion.

^b This according to the Topography of the Agent of the United States is indisputably the river Scoudiac. Vide his argument, part 3, Sect. 9. [Supra, 140.]

^c Governor Bernard's Surveyor. This account of Mitchel's has at length, in October 1784 become a matter of Record, by being annexed to this official report of the Commissioners.

^d All the maps annexed to Charlevoix's history of New France, and Voyages here referred to, are done by that eminent Geographer M. Bellin, in whose large "*Carte de L'Amérique Septentrionale*"—first published in 1744, this river representing the Scoudiac, terminating in the Lake or pond near the Penobscot is called the river St. Croix, and a short river westward of it answering to the situation of the Cobbeskook is called Posomocadie. A copy of this Chart published in 1755 is now before the Board from the original of which the Maps in Charlevoix were doubtless formed, and among them in the "*Carte de l'Acadie*," probably here referred to, these rivers are marked here in the same manner and the Magaguadavic is not laid down in either of the Cartes. [In Bellin's map the spelling is Pesmocadie.]

knowledge of, and do not refer to, any such public Record of John Mitchel's report, or return of his survey in the year 1764, as we are told by the Agent of the United States was a matter of such public notoriety in 1783 as naturally led the Commissioners at Paris to fix upon the river Magaguadavic as the river St. Croix; on the contrary, the only evidence that is offered at all of Mitchel's survey in 1764, is his own voluntary deposition taken in Boston^a the 9th of October 1784, ten days before the Report of these Commissioners. And this deposition is for the first time produced by these Commissioners, in support of their opinion of what they supposed to be the opinion respecting the River St. Croix of Mr Mitchell, the publisher of the Map which they were informed by Mr Jay was before the Commissioners at Paris, when the Treaty of Peace was made.^b

There is no intimation in this Report of any Claim by the Government of Massachusetts Bay having ever before that time been made or heard of to the river Magaguadavic, as the Eastern boundary of the Province of Massachusetts Bay. Indeed this Commission upon the face of it was a Commission of enquiry and discovery.

In this Report then is the origin of the discovery, that the river Magaguadavic was the original river St. Croix that formed a part of the original boundaries of the Province of Nova Scotia, the western limits of which Province are by the Treaty of Peace made the Eastern boundary of the United States, and consequently intended by the Commissioners at Paris in 1783.

Origin of claim
that Magagua-
davic was the St.
Croix, 1784

As we have now before us all the grounds of the opinion contained in this Report, we may examine them for ourselves, and although Mr Mitchell's Map will hereafter be a subject of more minute disquisition, it may not be amiss here to attend to the mode of reasoning upon it in the Report now under consideration, more especially as the same argument is adopted by the Agent of the United States, and in fact makes the whole of his cause.

Analysis of claim

The Commissioners state—

1. That there are three very considerable rivers which empty themselves into the bay of Passimaquady:

The eastern—the Magaguadavic,

^a He was an Inhabitant of Chester in the State of New Hampshire.

^b It was said by the Agent of the United States at the hearing of the cause "that the Commissaries who framed this Report really believed that John Mitchel who made this deposition was the author of the Map which was before the Commissioners at Paris in 1783." If so their erroneous construction of the Map is accounted for.

The middle river—the Scoudiac,
The western—the Cobbeskook.

That all these Rivers in the then late British Maps are called St. Croix.

2. That Mitchell's Map of the Eastern Coast is inaccurate, that it has in it laid down two rivers only of these three that empty themselves into Passimaquady Bay, and those two inaccurately.

3. That he has called the eastern river of these two which he has laid down the St. Croix, and the western the Passimaquady. Now comes the conclusion.

4. "Hence it is plain, that though the Map is inaccurate, yet the Eastern, or easternmost river which empties itself into the Bay is in the opinion of Mitchell the St. Croix."

This certainly is not very logical reasoning.

It would be equally just to conclude that the middle river, which empties itself into the Bay, is in the opinion of M^r Mitchell the St. Croix, the western river being called by him the Passimaquady, and the eastern too obscure to have been discovered or laid down at all. And this conclusion will not only be warranted by the Charts of the most eminent French Geographers, and the Topographical description of the bay by the Agent of the United States, but in a future examination of this map will be shewn to be perfectly just, and to agree with all the other maps of the Country published previous to M^r Mitchel's survey of the river Magaguadavic in the year 1764.^a

This report will for the present be dismissed with two observations:

1. That the western branch of the Scoudiac is by these Commissioners, conformable to all other accounts, considered as the main branch of that river, and that its source is by them estimated to be one hundred miles from the source of the Magaguadavic by them called the St. Croix, and that they considered its mouth as being at St. Andrews.

2. That the river Magaguadavic is by them considered as the St. Croix intended by the Commissioners at Paris in 1783, merely from its being supposed to be the original St. Croix, so that this point, as has been before observed, will after all be the only one to be settled in order to decide which is the river truly intended under that name in the Treaty of Peace.

It is upon the whole to be observed, that to prove the Magaguadavic to be the true ancient river St. Croix forming a part of the Western boundary of the Province of Nova Scotia, there is no testimony but the declarations of the Indians, not that the Magagua-

^a Vide Morse's American Univ. Geog. 3^d Edit. page 380, in notes.

davic is or ever was considered as a part of the Western boundary,—the only question in dispute; but that there is a tradition among them that this river is the ancient original only river St. Croix, and that it is known among them by that name without any other memorial but this simple tradition of a fact,—the original nomination of the St. Croix, which happened One hundred and Sixty years before this testimony was taken; and this tradition not only unsupported by but inconsistent with authentic histories and public documents clearly pointing out the true ancient original great river St. Croix, which has been so incontestibly proved to be the river Scoudiac.

We come now to the testimony of the Indians, produced, sworn, and examined as witnesses on the part of the United States before this honorable Board, at their session at St. Andrews, which materially supports the grounds of his Majesty's claim.^a

Testimony of the
Indians

The substance of it is, that the Indians call the Magaguadavic St. Croix; that the French gave it that name; that the Indians call the waters upwards from Brewer's (a place as before observed nearly opposite the northern point of St. Andrew's Harbour) by the name of Scoudiac; that the Bay below is called Passimaquady; that there is no river called Passimaquady; that the first cross was put up at the Magaguadavic; and two days after a cross was put up at St. Andrew's Point (near the entrance of the mouth of the Scoudiac called by the Commissioners in the foregoing report, made in October 1784, the Eastern bank of the river Scoudiac) by St. André a Priest, from whence it was called St. Andrews, which Cross was renewed by the Priests as it became rotten, and was standing about fourteen years ago; that they never heard the Scoudiac called St. Croix; that they have seen a cross, which was erected upon the Scoudiac at the carrying place; that all the Lakes upon the Western branch of this river, shewn them upon the plans extending near to the Penobscot, are known by the general name of Scoudiac, though the Lakes have also particular names to distinguish them from each other; that the northern branch of this river is called Cheputnatekook; that the little Island is in the mouth of the Scoudiac (herein before called Isle St. Croix) is called by the Indians Muttanagwamis, which signifies a place of deposit, like a store or chest; that the small Island near it is called Muttanagwis; that they have understood the French first landed at Magaguadavic, and then came to Saint Andrew's Point, and thence went to Muttanagwamis, where they erected a Fort; that the French first came with two Vessels one of which remained here; that all the French that

^a Vide appendix, page 133. [The appendices are not given.]

remained upon the Island died; and that the other vessel upon her return discovering this immediately went away again.

So far as the tradition among these Indians corresponds with the written accounts of the French historians, it is without doubt entitled to Credit, & serves to confirm those accounts; and there is in this testimony a surprising confirmation of the fact that the small Island in the mouth of the Scoudiac is the original Isle St. Croix of De Monts. The circumstances of the Fort being built there; of the mortality which prevailed; of its being a place of deposit and of course of resort for the Indians;^a and of its being so soon abandoned by the French, are too striking not to carry conviction, if there were no other proof of its locality, that this is the same Island upon which De Monts wintered in 1604.

From the other fact stated by them the presumption is violent, that the Scoudiac must have been called and known by the name of St. Croix, when even by this tradition, not only a cross was erected at the mouth of the Scoudiac, within two days after the erection of one at the Magaguadavic, but another cross was erected, upon the Scoudiac at the carrying place.

By comparing this testimony of the Indians with the account, given in the History of the District of Maine, before cited, "that Governor De Motte crossed from Port Royal, over to the main land into a great river which they called St. Croix"; that, "this name was given to the river and the country on its banks, because De Motte erected a cross fifty feet high on his landing," that, "the next year the Island of St. Croix situated at the mouth of the river of that name was abandoned by the French," it is impossible to avoid concluding, that this Cross of the Indians upon St. Andrew's point, particularly as it was with such care continued to the present times, must have been the great Cross of De Motte, or De Monts, and that from that circumstance, as well as from the superior magnitude and consequence of the river, probably came the distinction of this river as the *Great St. Croix*.

Indian traditions
tested by his-
torical narratives

It is very remarkable that there is no evidence of the continuance of any cross at the Magaguadavic, nor of any cross having been there, within the memory of any person now living.

By the Testimony of these Indians it also appears that the Western branch of the Scoudiac is the main branch of that river, and retains its name, whereas the Northern branch takes a different name, being called the Cheputnatekook.

That part of this testimony is also material, from which it appears

^a Vide ut ante, page 32 [22?]. [Supra, 179-80.]

that the river Scoudiac was never known by these Indians under the name of Passimaquady river. This will throw great light upon the construction of the maps, when they come under consideration.

It is further to be observed here that many of the Inhabitants of the town of St. Andrew's recollect the cross these Indians mention to have been standing upon St Andrew's Point fourteen years ago, and which remained there in the year 1783, upon a consecrated spot of ground, which they then and long afterwards, used as a place for the burial of their dead,^a which has been since relinquished for a spot within a tract of land at Point Pleasant, on the western side of Passimaquady Bay, within the State of Massachusetts, given to these Indians by that State. And these Indians also remember to have seen the other cross mentioned by them, as being erected at the carrying place upon the Scoudiac.

It is also observable that the French historians, tho very minute and particular in the detail of all their discoveries and transactions, have made no mention of any discovery of the Magaguadavic, nor of any cross having been erected there in their first voyages; which omission most certainly would never have happened had either of these facts existed at that time; and it is easy to imagine that the Magaguadavic was not then discovered or noticed, from the singular obscurity of its mouth, owing to the manner in which it enters the Bay. The probability is, that it must have been at some time subsequent to these voyages that a cross was erected at the Magaguadavic, if ever there was one there, from which it may indiscriminately with the other rivers have taken the name of St. Croix.

All the facts respecting the erection of crosses related by these Indians very forcibly point out the river Scoudiac as being most eminently the river St. Croix of the French, or the Great St. Croix. But the very striking parts of their tradition respecting the Isle St. Croix at once put it beyond all doubt, that this river is the river St. Croix which has always formed a part of the Western boundary of the Province of Nova Scotia, and is therefore unquestionably the river intended under that name in the Treaty of Peace.

Let us now suppose for a moment that, after all that has been advanced, it really could remain doubtful which of these two rivers, the Scoudiac or the Magaguadavic, is the true ancient river St. Croix named by De Monts in 1604. It is fully proved that both these rivers were known by the name of St. Croix, before, and at the time of the Treaty of Peace, and

Restrictive interpretation of limits of conquests

^a Vide Mr Currie's affidavit in the appendix, page 69. [The appendices are not given.]

it appears from the plans of the surveys now before the Board, that the river Scoudiac is by far the larger and more considerable river of the two. Is it not to be fairly presumed that in establishing one among several rivers as a boundary between two Nations that river must have been intended which was the largest and most considerable?

Let us go one step further, and suppose that at different times both these rivers, under the name of St. Croix, had been considered as the boundary between the Provinces of Massachusetts and Nova Scotia, and that it remained also in this case doubtful which of the two rivers was truly intended under that name by the Treaty of Peace, not only the size of the river would in this case determine the preference in favour of the Scoudiac, but another principle recognized and established by the Law of Nations for the interpretation of Treaties would be decisive in favour of the same preference.

The rule in this case is clearly laid down by Vattel as follows,* "The cession of a right or of a Province made to a conqueror in order to obtain peace is interpreted in its most confined sense." And it is remarkable that the instance given by this profound writer in illustration of this maxim bears singular affinity to the present question. "If it were true," says he, "that the limits of Acadia were always uncertain, and that the French were the lawful possessors of it, that Nation would have had right on their side in pretending, that by the Treaty of Utrecht they had ceded Acadia to the English, according to its most confined limits."

Not to dwell upon the broad applicability of the maxim itself upon the present occasion, wherein not one Province only but thirteen very extensive ones and an immense country besides were ceded, and in an instance wherein prior to the war the power to which they were ceded did not pretend a right to any part of the cessions, let us translate the case put by Vattel into the terms of the present question. If it were true that the limits of Massachusetts Bay were always uncertain and that his Britannic Majesty was the lawful possessor of it, he would have right on his side on this occasion in alleging, that by the Treaty of Paris in 1783 he had ceded Massachusetts Bay to the United States of America "according to its most confined limits."

If then there was any uncertainty in the present instance, what river was the river St. Croix, which had always been and was at the

* Vattel, B. 2, C. 17, Sect. 308. The Proprietor can only lose so much of his right as he has ceded of it; and in a case of doubt the presumption is in favour of the possessor. Ibid. Sect. 305.

time of the Treaty of Peace the boundary between Massachusetts Bay and Nova Scotia; if there were any uncertainty respecting the source of that river, from whence the line is to be drawn due North to the highlands, to form the Northwest angle of Nova Scotia, at which the boundaries of the United States by the treaty commence—either of which doubts, it is presumed, it hath been fully shewn cannot exist; still even in such case, if the river Scoudiac or, in other words, “the river commonly called and known by the name of St. Croix which emptieth itself into Passimaquady Bay, on the western side,”^a could be proved to have been at any time the established boundary between these two Provinces, and this limit is a more confined limit than the limit claimed on the part of the United States, even admitting the latter to have been at any time considered as the limit between the two Provinces, his Britannic Majesty would have right on his side in alleging before this honorable Board that he ceded Massachusetts Bay to the United States of America by that confined limit. Much stronger and clearer then is that right, when the fact is, as has been fully proved, that the limit claimed on the part of the United States never was the limit, nor ever was at any time considered as the limit, between those two Provinces.

This it is humbly conceived is another ground in support of his Majesty’s claim, which alone would be sufficient to ensure the full and complete establishment of it by the decision of the honorable Board upon the present occasion.

The underwritten Agent will now request leave briefly to recapitulate the points which he conceives to be fully established in the foregoing argument:

Recapitulation of points established by argument

1. That it was clearly intended by the 2^d article of the Treaty of Peace, that no part of the Province of Nova Scotia should be thereby ceded by his Majesty to the United States, but that the Province of Nova Scotia according to its ancient limits should be and remain a part of the Territories and dominions of his Majesty, as his Majesty then and before that time had held and possessed the same.

2. That the river St. Croix, eminently so called, and contemplated under that name, in the said second article of the said treaty, was originally called by that name by the Sieur De Monts in the year 1604, and is the same river that is mentioned under that name in the histories of L’Escarbot, Champlain, & De Laet, and in the history of the District of Maine, severally referred to, and cited in the foregoing argument.

3. That the same river St. Croix was contemplated, intended and

^a Vide ante, page 106. [Supra, 218.]

mentioned under that name, as part of the western boundary of the Province of Nova Scotia in the grant of the said Province to Sir W^m Alexander in the year 1621.

4. That the same river St. Croix from its original appellation in the year 1604 down to the said Treaty of Peace in the year 1783, and that river only has been contemplated and referred to under that name in the French and English histories & accounts of this Country, and in the Public Transactions, Documents, and Acts of State of both nations.

5. That the same river St. Croix is mentioned, intended, and referred to, under that name, in the herein before recited twelfth section of the tenth chapter, of the Act of Parliament of Great Britain, made and passed in the fifteenth year of his present Britannic Majesty's reign.

6. That the river called Scoudiac by the Native Indians fully corresponds and agrees with the descriptions given of the said river St. Croix in the said histories, and other accounts thereof, and in the said Act of Parliament.

7. That neither the river called Magaguadavic by the native Indians, nor any other river emptying itself into Passimaquady Bay, except the said river Scoudiac corresponds or agrees in any of the essential characteristics with the said descriptions of the river, so as aforesaid originally called, and constantly and uniformly known by the name, of the river St. Croix.

8. That the Western branch of the said River St. Croix otherwise called Scoudiac, extending itself near to the Penobscot, has always been, and now is, justly, properly, and truly called the main branch of the same river, and that the head or source of the said western branch is the true and proper head or source of the said river St. Croix.

9. That there is no other river which empties itself in, or near to the said Bay of Passimaquady, which from its magnitude can be considered as a proper boundary, between different Provinces, Countries, or States, when compared or put in competition with the said river Scoudiac or St. Croix.

10. That the said river St. Croix, otherwise called Scoudiac, has from the date of the said Letters Patent to Sir William Alexander in 1621 down to the Treaty of Peace in 1783, been a part of the known and established western boundaries of the said Province of Nova Scotia, and has been considered and acquiesced in as such by the Province of Massachusetts Bay, from the date of their Charter from King William and Queen Mary in 1691 in ¹ the time of the said Treaty of Peace.

¹ So in State Department copy; but "1691 in" evidently is a copyist's error for "1691 to."—EDITOR.

11. That the Jurisdiction of the Government of the Province of Nova Scotia was in fact exercised previous to the said Treaty of Peace over the whole Territory, lying Eastward of the said river Scoudiac or St. Croix, to the exclusion of the Jurisdiction of the Province of Massachusetts Bay.

12. That in the said 2^d Article of the said Treaty of Peace in 1783, the said river St. Croix, otherwise called Scoudiac is mentioned as a well known boundary of the Said Province of Nova Scotia, and did in fact at that time form a part of the Western limits of the said Province. That it must have been so understood by the contracting powers at that time, and that the intention of the said treaty must now be interpreted accordingly. And consequently—

13. That the said river Scoudiac is the river truly intended under the name of the river St. Croix in the said Treaty of Peace, and forming a part of the boundary therein described. And that the North-west angle of Nova Scotia intended by the said treaty, is that angle which is formed by a line drawn due North from the furthest source or Spring of the said western branch of the same river to the highlands described in the said treaty.

The underwritten Agent had by no means contemplated the necessity of so elaborate a discussion of the various documents that have been produced in this cause or of so tedious a detail of authorities, to prove what he conceived to be points that could never be disputed.

But the unexpected, and as he conceives untenable grounds that have been insisted upon by the Agent of the United States, have compelled him to be thus particular. He has endeavoured in the course of the foregoing argument to answer with a very few exceptions, every thing that has been advanced, relevant to the question in issue, in those parts of the argument in support of the claim of the United States, with which he has hitherto been furnished.

Lest however, an idea should for a moment exist, that there is anything remaining unanswered, which it is not easy to confute, he will proceed in a separate reply, to those particulars in the argument of the Agent of the United States, which he has not already noticed.

WARD CHIPMAN, *Agent for his Britannic Majesty.*

BOSTON 10th August 1797.¹

¹ The text of the foregoing Statement, in the Department of State, is followed by this certificate: "This Book contains a true copy from the original filed with me. /Att. Ed. Winslow Secretary to the Commissioners &c: /Providence/ Rhode Island./ 20th October 1798." For comments, see *infra*.—EDITOR.

2. REPLY TO MR. SULLIVAN'S ARGUMENT

(a) FIRST PART

To the Honorable the Commissioners,—appointed pursuant to the fifth Article of the Treaty of Amity, Commerce and Navigation concluded between His Britannic Majesty and the United States of America on the 19th day of November 1794, to decide what River is the River St. Croix by the Treaty of Peace between His said Majesty and the said United States and forming a part of the Boundary therein described. * page 1

The underwritten Agent of His Britannic Majesty having in his first Argument, as he humbly conceives, fully evinced, and he hopes to the Satisfaction of each of the Members of this Honorable Board, the Truth of the premises laid down in his Memorial of Claim, and the fairness of the Conclusions drawn by him from those premises and having also in that Argument endeavored to answer, with very few exceptions, every thing of any Importance to the present cause, which he has been able to discover in the Arguments yet delivered to him by the Agent of the United States; he will now proceed to reply to those facts and Observations, adduced in support of the Claim preferred on the part of that Government, which consistently with the Plan of his first Argument, could not with propriety be therein discussed; in the full persuasion, that every step he advances will throw some new light upon the justice of His Majesty's Claim.

*The Agent of the United States, after some preliminary Observations and the Introduction of his Argument, states the following points, which he proposes to maintain before this Honorable Board in support of the Claim he has exhibited: *2

1. That there was not when the Treaty of Peace was concluded upon in the Year 1783, any Province within His said Majesty's Dominions called *Nova Scotia* founded in Grant to Sir William Alexander in the year 1621, or at any other date. Recapitulation of American contentions

2. That by the Charter of William and Mary in 1691 to the Province of the Massachusetts Bay in New England, the whole of the Country and territory between the River *Sagadahoc or Kennebec* on the West and the river and Gulph of St. Lawrence on the East and North, and on the Atlantic Sea or Ocean on the South, including what is now the Provinces of Nova Scotia and New Brunswick was granted to the said Province of Massachusetts Bay, and that no line of division or compact, or a order of restriction had in the year 1783 ever been agreed upon or made, by which the same Lands were taken from the said Province.

* In the copy of Mr Sullivan's Argument filed after he had received a Copy of this reply—he says "*express order of restriction.*"

*3 3. That when he shall have performed this part of his duty, he will then proceed to shew by *indubitable evidence*; That in the treaty of Peace concluded in 1783, the River therein truly meant or intended under the name of the *river St. Croix, was the River now called by the native Indians the River *Magaguadavic*.

4. That he will then consider what ought to be deemed and taken as the source of the river St. Croix, according to the meaning and intendment of the treaty of 1783.

As it is obvious that if the third of these Positions can be maintained, the discussion of any other point will be rendered altogether unnecessary, the underwritten Agent will in the first place apply himself to an Examination of the Grounds of claim to *Magaguadavic* Grounds upon which this very important position is advanced.

But before this enquiry is proceeded in it is necessary to advert to the rules and principles established by the Law of Nations for the Interpretation of Treaties.

The Agent of the United States seems to suppose, that to prove by the Commissioners themselves who made the treaty of Peace, what river was by them intended under the name of the river St. Croix mentioned in the said treaty is the same thing with or equivalent to proving, what river was truly intended under that name by the Treaty.

This appears from his using these Terms indifferently in the course of his Argument^a and he expressly says in one part of his Argument upon this point^b

*4 The question here is not what was an ancient line, either of dominion *or possession, but what line was agreed upon by the Commissioners in the year 1783.^c Where there are no papers, records, or written explanation of the question one would be naturally led to ask the men who made the settlement what river they truly intended as the river St. Croix? For let what river will be now or formerly called the St. Croix, yet the river they agreed upon, was truly intended by the treaty in 1783 as the St. Croix.

The treaty is a law by which the nations in whose behalf it is made, are bound; and this law must be expounded and interpreted by those

^a Vide part 3, Sec. 1, 2. [Supra, 136-7.]

^b Ib. Sec. 15. [Supra, 143.]

^c The Agent for the United States in the Copy of his Arguments filed after he had received Copies of the Argument and reply of the Agent of His Majesty, has in this and most other instances when speaking of the treaty of peace called it the treaty of 1782, the provisional articles being signed in that year. There are also several other instances, tho' not very material in which the Copy of his Arguments filed with the Secretary is different from that delivered to the Agent of His Majesty, as will appear in the course of this reply.

Rules which are prescribed in such cases by the Law of Nations. But it is contended that the intention of the treaty can never consistently with the rules and principles of that law, with reason or with common sense, be proved by *the Commissioners themselves who made the Treaty.* Terms of treaty must prevail over opinions of negotiators

As in the case of all other legislative Powers, the moment the law is made and duly ratified, the Commissioners who made it can have no further concern with it; but the interpretation of it must be governed by known and established rules and principles.

It will appear by recurring to the Law of Nations, that the Governments of the respective Countries concerned in the question now depending before this Honorable Board, are obliged if they would preserve good faith with each other, to admit and follow these rules. And *in that Law of Nations will be found those rules and principles, by which the present treaty, as well as all others, ought to be interpreted. *5

^a In the interpretation of treaties,

It is necessary to establish rules founded on reason, and authorized by the law of nature, capable of diffusing light over what is obscure, of determining what is uncertain, and of frustrating the Attempts of a contracting Power void of good faith. . . . As these rules are founded on right reason, and are consequently approved and prescribed by the law of nature, every Man, every Sovereign, is obliged to admit and to follow them. If Princes were to acknowledge *no rules that determined the sense in which the expressions ought to be taken*, treaties would be only empty words; nothing could be agreed upon with security, and it would be almost ridiculous to place any dependence upon the effect of conventions.

But Sovereigns acknowledging no common Judge, *no superior that can oblige them* to receive an interpretation founded on just rules; *the faith of Treaties* here forms *all the security* of the contracting parties. This faith is not less wounded by a *refusal to admit* an evidently right interpretation, than by an open infraction, it is the same injustice, the same infidelity; and for one of them to involve himself in the subtleties of fraud is not less odious.

The interpretation of every act, and of *every treaty, ought then to be made according to certain rules, proper to determine the sense of them, such as the parties concerned must naturally have understood when the act was prepared and accepted. *6

^b The fairest and most rational method to interpret the will of the Legislator, is by exploring his intentions at the time when the Law was made, by signs the most natural and probable. And these

* Vatt. B. 2, C. 17, Sec. 262-268, 269.

^b Bl. Com. Vol. 1, p. 57, Of the Nature of Laws in general. Puf. B. 5, C. 12, Sec. 2.

signs are either the words, the context, the *subject matter*, the *effects and consequence* or the *spirit and reason of the Law*. [Blackstone.]

The true end and design of interpretation is to gather the intent of the man from *most probable signs*. These signs are of two sorts words and other conjectures. [Pufendorf.]

In these rules we find no mention of resorting to the legislator, to obtain *from him* an explanation of the expressions he has used.

^a Since the lawful interpretation of a contract ought to tend only to a discovery of the thoughts of the author or authors of that contract, as soon as we meet with any obscurity we should seek for what was *probably* in the thoughts of those who drew it up, and to interpret it accordingly.

Here the word *probably* in conformity to all other rules of interpretation and the explanation of them, shews that we are not to resort to the authors or contracting Powers themselves to interpret their own acts.

*7 *In the present instance "doubts have arisen what river was truly intended under the name of the river St. Croix, mentioned in the treaty of Peace and forming a part of the boundary therein described," which question is referred to the final decision of this Honorable Board.

It is presumed that it has been fully established by the under-written Agent in his first argument, that it was *clearly intended by the treaty of Peace*, that the United States should be bounded on the East *by that river St. Croix* which then formed a part of the western boundaries of the Province of Nova Scotia, and from the source of which, consequently, a line drawn due North to the Highlands would form the North west angle of Nova Scotia.

If the *Commissioners* then who made the Treaty of Peace were all alive and should now declare that they *actually intended* the individual river Magaguadavic under the name of the river St. Croix, in the treaty; still if it can be shewn that the river Magaguadavic was not a part of the boundaries of the Province of Nova Scotia, and consequently that a line due North from its source to the Highlands would not form the Northwest angle of Nova Scotia, it must clearly appear that the river Magaguadavic could not be the river *truly intended* under the name of the river St. Croix *by the treaty*; for the

*8 testimony *of the Commissioners who made the treaty could never be admitted to prove any river known by the name of St. Croix to be the river truly intended under that name by the treaty, against the intention of the treaty in this respect clearly expressed, that such

^a Vatt. B. 2, C. 17, Sec. 270.

river must form a part of the boundaries of the Province of Nova Scotia.

It has been fully proved that the river Scoudiac, under the name of the river St. Croix, at the time of the Treaty of Peace formed a part of the western boundary of the Province of Nova Scotia.

It also appears that the river Magaguadavic was at the time of the treaty of peace known by the name of St. Croix, but there is no evidence that it was ever known as a part of the Western boundary of the Province of Nova Scotia.

Let it be asked then, by the rules of interpretation above cited, and others mentioned in the former argument of the underwritten Agent,^a which of the rivers must be decided to be the river St. Croix truly intended by the Treaty of Peace?

If it be said the latter, it will be directly repugnant and contradictory to the evident design of the treaty not to cede any part of the Province of Nova Scotia to the United States, and the original boundary or place of beginning, from which all the other boundaries are to be traced, viz. the Northwest angle of Nova Scotia will not be *found, and consequently the whole Article will be rendered nugatory. *9

But if the former is adopted the evident intention and meaning of the treaty will be complied with, in every respect, the first station will be found from which all the other boundaries are to be traced, and those boundaries will close on the East at the place of beginning, agreeably to the clear and express words of the treaty.

There seems to be an intimation in that part of the argument of the Agent of the United States, which is now under consideration, that one, at least, of the very eminent and respectable surviving Commissioners who assisted in forming the Treaty of Peace at Paris in 1783, will be requested to appear as a Witness in this cause on the part of the United States to prove that the river Magaguadavic, claimed as the river St. Croix on their behalf, was the river truly intended under that name, by the treaty; indeed it was for this express purpose that the Agent requested the present Session of this Honorable Board to be held at Boston.

Should this evidence be taken upon the present occasion, it will perhaps be the first instance, wherein one of the contracting powers has been admitted to interpret a treaty. In the rules laid down for the interpretation of treaties, and for discovering the intentions of *the parties concerned, by the most approved writers upon the Law of *10 Nations, it is considered as a Maxim: ^b

^a Vide former Argument, p. 118. [Supra, 224.]

^b Vatt. B. 2, C. 17, §265.

That neither the one nor the other of the interested or contracting Powers, has a right to interpret the act or treaty at his pleasure. For if you are at liberty to give my promise whatsoever sense you please, you will have the power of obliging me to do whatever you have a mind, contrary to my intention, and beyond my real engagements; and reciprocally, if I am allowed to explain my promises as I please, I may render them vain and illusive by giving them a sense quite different from that in which they were presented to you and in which you must have taken them in accepting them.

* Such is the nature of man that his *internal Actions* are not in themselves visible to another and *may differ* from his *external signs and actions*, and yet we lie under a necessity to distinguish clearly what every man is obliged to, or what may lawfully be demanded of him; for there would be no such thing *as obligation* if anyone might free himself by affixing what sense he pleased to his *signs*, and by pretending that he meant *different from their true signification*. And therefore right reason dictates that he to whom the obligation is made should have a right to compel him from whom 'tis due to the performance* of it in that sense, which the *right interpretation of the signs made use of imports*. For tho' the man himself is chiefly concerned in what *he meant* yet others must act by signs, for else the matter would be to no end or purpose, which in morality is absurd.

These rules, laid down by the writers upon the Law of Nations, are founded partly upon the same principle, that in all Governments where there is any political liberty, the legislative and judicial powers are kept separate, of which the latter, in its decisions, must be governed by the fundamental principles of the municipal law, as sovereign powers, in the construction of treaties, if they would preserve their faith, must be governed by the established rules and principles of the Law of Nations.

It would be a novelty indeed in any well regulated government, to call upon a member of a legislative body, to know what *he intended* by the expressions in a law, in case of a doubt arising respecting their construction; and far more extraordinary to enquire of a party concerned in forming a treaty between two Nations, what *he intended* by the terms made use of in it, about which any doubt might arise.

It is conceived therefore in the present instance, that no testimony of the Commissioners who made the Treaty of Peace at Paris in 1783 *can be received by this Board to explain what was intended by that treaty, even if all those Commissioners were now alive and upon the spot for examination, much less when the only Commissioner on the part of Great Britain at Paris at that time is dead.

*12
Testimony of
negotiators
inadmissible

* Puf. B. 5, C. 12, § 2. [Fifth edition, London, 1749.]

In the first place, let all those Commissioners be supposed alive, and ready to testify that they all clearly intended the river St. John under the name of the river St. Croix in the treaty of peace; for the river St. John, as well as the Magaguadavic, Scoudiac, Cobbskook, and Penobscot and many other rivers between New Hampshire and the river St. John, have at times been known by the name of St. Croix.^a

This testimony would be conclusive, or it would not be;—if conclusive, it would establish the position that the Northwest angle of Nova Scotia, at the time of the Treaty of Peace, was formed by a line drawn due north from the source of the river St. John to the Highlands described in the treaty, or, that the northwest angle of Nova Scotia was not intended to be a part of the boundary. *As ^{*13} the river St. John never at any time formed, and was never supposed to form a part of the boundaries of the Province of Nova Scotia, the former position could not be contended for, and if the latter were admitted, then by this testimony, under the pretence of interpreting a boundary unequivocally expressed in the treaty, an entirely new boundary might be formed.

If this testimony would not be conclusive it would be nugatory altogether, because it would necessarily follow that the true intention of the treaty might be totally different from what the Commissioners who made it might declare to have been their intentions, and of course that these declarations would not be proof of what was intended by the treaty, except so far as they should corroborate other proofs of what was truly intended in the treaty, by the terms respecting which the doubt had arisen.

Let us in the next place suppose that upon such examination, the British Commissioner should say that he fully intended the river Scoudiac under the name of the river St. Croix in the treaty; and that the American Commissioners should say that they fully intended the river Magaguadavic under that name in the treaty; in this case neither of these declarations could be evidence, because being of equal validity and contrariant they *would destroy each the force ^{*14} of the other, and the question must still be decided by ascertaining

^a "The truth was, that when the French landed on the west bank of what is now called the Bay of Fundy, they erected a cross on the land and gave the whole country the name of the *Holy Cross*. The rivers had no name at that time, but such as were expressed in the Indian language, and therefore among the Europeans took the general name of the country, and were all for that time called St. Croix." Sullivan, p. 59. As the French, according to their mode of taking possession, always fixed a cross in every River they came to, almost every River on this Coast of Sagadahoc has in its turn been deemed by them La Rivière de St. Croix.—Pownall's topographical description of North America, p. 20.

which of these rivers formed, at the time of the Treaty of Peace, a part of the boundaries of the Province of Nova Scotia, which is beyond doubt the river truly intended under the name of S^t Croix by the treaty.

Let the fact then be considered as it really is, that the only Commissioner on the part of Great Britain that signed the Treaty of Peace, at Paris in 1783, is dead, and let us suppose that the two surviving American Commissioners should upon the present occasion testify, that they intended the river Magaguadavic under the name of the river S^t Croix in the treaty, notwithstanding the full and clear evidence that has been offered that the river Scoudiac is the river which is and always has been a part of the western boundary of the Province of Nova Scotia: in this case, if the testimony should prevail, it would be inconsistent with the obvious meaning of the treaty, that no part of the Province of Nova Scotia was to be thereby ceded to the United States and to the express words in the treaty making the Northwest angle of Nova Scotia the first boundary; And thus also under colour of interpreting the treaty, a boundary altogether new and inconsistent with the plain unequivocal terms of the treaty would be formed.

- *15 It may be added that if such evidence *were admissible at all, it would have precluded the necessity of the present Commission. One of the Commissioners on the part of the United States in forming the Treaty of Peace, was also their Commissioner in forming the present Treaty of Amity, Commerce and Navigation; and the British Commissioner in forming this latter treaty had only to desire him to declare what river *he intended* under the name of the river S^t Croix, in the Treaty of Peace, which would have settled the Question at once, without the trouble and expence of the present Commission, when such a declaration was finally to decide the matter.

The treaty under which the present Commission exists provides that the question now depending shall be referred to the final decision of Commissioners to be appointed as this Board is formed; but to call upon the Commissioners who made the Treaty of Peace for their opinions and intentions, would be in effect referring the question to their final decision, or would be altogether nugatory.

If it shall be said that Mitchell's Map was before the Commissioners at Paris in 1783, and that those surviving Commissioners are to prove that the river marked on that Map as the river S^t Croix was the river intended by the treaty of 1783. still the same difficulties and the same objections to this testimony will recur, if that river was

- *16 not at the time of the treaty the western boundary of the *Province

of Nova Scotia, and of a line due north from the source of it to the Highlands did not then form the northwest angle of the Province of Nova Scotia, for it surely will not be contended, that this testimony would establish a river to be the ancient boundary of Nova Scotia, which had never 'till then been considered as such, especially as a different river could be proved to have been that ancient boundary.

It will however appear, when that Map shall come under the Inspection and consideration of the Board, that the river therein laid down as the river S^t Croix is clearly the river Scoudiac.

So that after all the point to be proved is, what river, under the name of S^t Croix, was in fact, at the time the Treaty of Peace was made, the Western boundary of Nova Scotia, and the river from the source of which a line drawn due north to the Highlands formed the northwest angle of that Province; for this is most clearly the river intended by the Treaty of Peace, whatever river the Commissioners who made that treaty might have contemplated and considered as being such boundary, for if the river they contemplated and intended under the name of the river S^t Croix was not such boundary, their testimony *would only prove that they were mistaken in supposing it to be so.*^a

The authority of this Honorable Board is "by a declaration under their Hands and Seals *to decide, what river is the river S^t Croix *intended by the treaty,*" not by the Commissioners who made the treaty. *17

It is concluded therefore by the Agent on the part of his Majesty, that the testimony of those surviving Commissioners, for the purpose of proving any other river to be the river S^t Croix intended by the Treaty of Peace, than that which at that time formed a part of the Western boundary of the Province of Nova Scotia, is inadmissible, because contrary to the known and established principles and rules of the Law of Nations and because, admitting it would prove what it is offered for, it would be totally irrelevant to the point in question. The contracting parties only agreed on what was *mutually signed and sealed*, and the admission of such Testimony as competent would be to all intents making a supplemental and *verbal treaty*, instead of a just interpretation of the former one, which is the sole and exclusive object of the present Commission.

But if the foregoing reasoning were not conclusive against the admission of this testimony, the very ground upon which it is offered, would preclude its reception; for the Agent of the United States does not attempt to justify its production, but upon the consideration that "*there are*

Pertinency and
effect of docu-
mentary proofs

^a Vide post, p. 60.

*18 *no papers records or written explanation of the question," in which case he says, "one would be naturally led to ask the Men who made the settlement what *river they truly intended as the river St. Croix," and he at the same time avers,^a that he could mention "a great variety of Authors, Maps and Documents tending to shew that the river Magaguadavic being a river running into the Bay now called Passimaguady on the Northeast side thereof, had long before the Charter of William and Mary and from the earliest date of settlements by Europeans there, been called and known by the name of the river Saint Croix; and that no other river there had been called or known by that name in any Map or public proceeding before the passing of the said Act of Parliament of Great Britain in the year 1775."*^b

Such Proofs would certainly be very pertinent, and when they are produced the underwritten Agent will give them the most candid examination, and every degree of weight and credit they may be entitled to, as his Object is, in preference to every other consideration, sincerely to investigate and establish the *Truth*.

Before this part of the Argument is dismissed, it will not be improper to mention another rule of the Law of Nations in the interpretation of treaties, the applicability of which upon this occasion and in this place will be obvious. It is this: °

*19 The contracting powers are obliged to express themselves in such a manner, as they may mutually understand each other. . . . They *should affix to the Terms they use and to all their expressions *the received signification*. They are not permitted to *deviate with design, and without mentioning it* from the common use and propriety of the expression, and it is presumed that they have conformed to it, while there are no pressing reasons to presume the contrary.

Now as it has been so fully proved that the river St. Croix emptying itself into Passimaguady Bay on the *Western side* thereof was the known and established western boundary of the Province of Nova Scotia from the year 1621 down to the Act of Parliament in 1774, which act from its peculiar nature and object must be supposed to have been in the recollection of the Commissioners on the part of the United States who made the Treaty of Peace in 1783,^d and as the intention of the treaty is so clear to leave the Province of Nova Scotia entire to His Majesty, were it now possible to prove that by the river St. Croix in the treaty of 1783 the river Magaguadavic

^a Vide his argument, part 3, § 7. [Supra, 139.]

^b This act was passed in November 1774. 15 Geo. 3^d

^c Vatt. B. 2, C. 17, No. 271.

^d Vide Mr. Adams' Testimony in supplemental argument.

was really and truly intended *by the Commissioners*, still as in that case *they deviated*, whether with or without design is immaterial, *from the common and ancient appropriation of that name*, as they have not mentioned any such *intended deviation*, nor given any *local designation*, for identifying the river in question, but have pointed it out only by that name by which for so long a time the western bounds of Nova Scotia *had been known and distinguished, the inference unquestionably must be that, disregarding their *error* if it was one, or their *design*, if it was intended, the *contracting Powers* are bound to understand *by the river St. Croix*, that river which from its mouth to its Source was in fact *a part of the ancient western boundary of the Province of Nova Scotia and continued such to the time of that treaty*. *20

From every acknowledged rule of interpretation when applied to the treaty in question, it must be presumed that on the one part in making, and on the other in accepting the Cession of the territory therein yielded to the United States, it was intended by the contracting Powers, so to describe the limits of that territory as to leave no room for any doubts or disputes on a point of such essential importance: they must be supposed therefore to have taken it for granted that the name of *St. Croix* was *clearly and exclusively* indicative of the river they intended. It must also be presumed that those limits thus described in the treaty were on the one part intended and on both parts understood to convey nothing beyond their *indisputable import*. Parties bound by import of treaty

The Agent of the United States in the part of his Argument now under consideration, after mentioning some Maps, which shall presently be considered, goes on to say,^a

But there are other circumstances which had a powerful tendency to fix the eyes of the Commissioners on the *Magaguadavic as the boundary line. One of the American Commissioners had long been acquainted *with the controversy upon this very territory*, between the Crown of Great Britain and the Province of Massachusetts. *Not in a controversy respecting which was the river St. Croix* but whether the Province should be continued to extend to that river. His attention had therefore been naturally turned to that part of the Country, *and the other Commissioners would be naturally led to submit the direction of this question to his understanding & discretion*. The controversy with the crown managed by the Agents of the Province, before the Lords of Trade has been already mentioned.^b But there were other Transactions which had been of great notoriety in the Province and with which that learned and attentive Commissioner, had been in public life intimately ac- *21

^a Vide his argument, part 3, § 18, 19. [Supra, 150, 158.]

^b Vide former Argument, p. 88. [Supra, 213.]

quainted. As soon as the peace was concluded in 1763 between the English and French Crowns, *the Government of the Province asserted its claim to the river Magaguadavic as the river St. Croix to which there had been, on the reasons before explained, a consent that it should be extended.*^a On the 14th [25th] April 1764, Governor Bernard issued his orders to John Mitchel, *appointed a Surveyor for the purpose, in the words following &c.*^b . . .

In the year 1770 Governor Hutchinson issued a Commission with the advice of Council to General Brattle &c.^c

*22 *It has been already shewn that the transactions here referred to furnish the strongest evidence in support of His Majesty's Claim to the river Scoudiac as the true St. Croix, and that the Province of Massachusetts Bay at the times referred to in those transactions, contemplated the same river under that name. But the evident design of the Agent of the United States in this place is to insinuate that the American Commissioner here referred to must have contemplated *the river Magaguadavic as the true St. Croix*, from his being acquainted with the controversy alluded to, *and with the Claim of the Government of the Province of Massachusetts Bay to the river Magaguadavic as the river St. Croix.*

That this learned Commissioner considered the Transactions here referred to in the same light which has been so fully shewn to give their true construction, or at least that he did not contemplate the river Magaguadavic as the river St. Croix intended in the treaty, may be fairly inferred from his not having it *identified by some local designation*, or inserting the Indian name by which this river was known so as to put an end to all future controversy on the subject; and the silence of the treaty on that head, when all the facts respecting it are acknowledged to have been well known by this Commissioner, "*to whose understanding and discretion the direction of this question would be*

*23 *naturally submitted by the other Commissioners,*" forever precludes any subsequent pretensions of Massachusetts to an extent of their territory or establishment of their former claims, if they had ever in fact made any, beyond the ancient boundary of Nova Scotia:

If at the time of the Treaty of Peace this Commissioner did claim the river Magaguadavic as the true St. Croix, which we have no reason to suppose, it is clear by its not being described by permanent local designations that his claim must have been rejected, as he, with all the other Commissioners, left the real boundary to be *identified*,

^a As this consent is something which took place before the Peace in 1763, it is not easy to discover what is referred to.

^b Vide former argument, p. 96. [Supra, 214.]

^c Ib. p. 99. [Supra, 215.]

not by party views and claims, so unworthy their attention in so great and important a national transaction, but on dignified, liberal, public principles, whereon no dispute could be foreseen or apprehended, by ascertaining the ancient western boundary of the Province of Nova Scotia as on the *main-land* it was recognized and established by the Highest Authority, an Act of the British Parliament, known to both parties at the time; *and with regard to the Islands*, a conformable provision was made in express Terms equally clear and unambiguous whereby all the Islands that then were *or theretofore* had been within the limits of the said Province of Nova Scotia were reserved and continued as a part of His Britannic Majesty's *Territories and Dominions. *24

There appears to be some perplexity in this third part of the Argument of the Agent of the United States which renders it difficult to ascertain his meaning. In one place he says ^a

that from all the researches he has been able to make, the ancient Historians, Documents of State and ancient Maps, are generally if not all against the position of the Agent for His Majesty but were they all in favour of his averment, yet no certain conclusion could result from them; for *whatever Authors or Voyagers, might denominate the river St. Croix the Commissioners in 1783. might intend whatever river they pleased by that name*, and under that name make it a part of the boundary between the Nations. It ought to be observed that the question now to be decided, *is not, what river was anciently by Authors or Navigators called the St. Croix*, but what river was TRULY INTENDED BY THE TREATY OF PEACE IN 1783 by the name of the river St. Croix, as forming part of the boundary therein described.

From this paragraph the natural conclusion would be, that he expected to prove the river Magaguadavic to be the river mentioned under the name of the river St. Croix, in the Treaty of Peace, by shewing that *individual river to have been intended by the Commissioners at Paris in 1783*, without their having had regard *to any consideration whether it was or was not *the ancient and only river St. Croix* contemplated by historians and referred to in the public Documents and Acts of State of the English and French Nations. And yet in opening his proofs under this Head ^b he tells us that he could mention, "a great variety of Authors, Maps and Documents to prove the river Magaguadavic *from the earliest date of Settlements* by Europeans THERE to have been called and known by the name of the river St. Croix, and that no other river THERE had been known or called by that name in any Map or *public proceeding* before the Act

^a § 2, 4, 5. [Supra, 137-9.]

^b § 7. [Supra, 139.]

of Parliament in 1775," but these Heads are omitted for the present, and that "he will begin with those facts which took place more recently."

Here the ground is entirely shifted, and Magaguadavic is to be proved to be the river truly intended under the name of the river St. Croix in the Treaty of Peace, *because it was the ancient and only river called and known by that name*, and to this purpose is the full & decisive deposition of M^r John Mitchel sworn to in the year 1784, which has already had all due consideration.

There appears in this third part of the argument of the agent of the United States an evident conviction that the only question in this

*26 Examination of proofs and observations advanced by United States as to historical St. Croix cause is, "*which is the true ancient river St. Croix, so called by De Monts in 1604, and ever afterwards in all histories and public proceedings referred to *under that name,*" and at the same time a fear of resting the cause upon that issue.

The underwritten Agent will therefore proceed to an examination of those proofs and observations advanced under this head of the argument in support of the claim of the United States, which have not been replied to.

The Agent of the United States goes on to say,^a

By the second article of the Treaty of Peace in 1783, it is agreed, that the Eastern boundary of the United States shall be from the mouth of the river St. Croix in the Bay of Fundy to its source and thence directly North to the Highlands; this is explained by the beginning of the boundary in that article: Where the Northwest angle of Nova Scotia is described, it is said, *to wit, that angle which is formed by a line drawn due North from the source of the St Croix, to the Highlands*. If the bounds of Nova Scotia had been known from any *ancient* Charter, there could have been no necessity for thus giving it a boundary; *but the fact was, that no boundary had ever been known between the Provinces, except by an implication resulting from the dissolution of the Duke of York's Government*.

Sir William Alexander's Charter of the Province of Nova Scotia made so long ago as the year 1621, it is presumed must be admitted to be an *ancient* one, and it cannot be denied that the boundaries of Nova Scotia are described in it.

*27 *As there had been before the treaty of Peace in 1783 an ancient Western boundary of Nova Scotia *established by Charter in the year 1621 at the river St. Croix*, and in consequence of the French encroachments there had been a *reputed western boundary* of Nova Scotia, at the time of the Treaty of Utrecht in 1713, at the river Penobscot, it

^a § 8. [Supra, 140.]

therefore became necessary in order to prevent all future controversy on this subject to specify in the treaty of 1783 which of these boundaries was intended, and accordingly the former, the ancient real and established boundary is expressly adopted.

But it may be further observed that altho' the boundaries of Nova Scotia were known from the ancient Charter of Sir William Alexander in 1621 and the Act of Parliament establishing the southern boundaries of the Province of Quebec, still it was highly proper and expedient, in giving the specific original boundaries of the United States, that the lines forming this Northwest angle of Nova Scotia, the first station from which the other boundaries were to be traced, should be particularly expressed, and it would have been a very inartificial description of the boundaries if they had not been precisely mentioned upon this occasion.

The Agent of the United States proceeds thus,^a

The Commissioners who form this Honorable Board, having been on the place *in controversy, having seen the rivers claimed to, and having an accurate Map of the Country before them, must have anticipated these observations,—viz. *28

1st That there is a body of Waters now called the Bay of Passamaquady, which is between the Bay of Fundy and the main land Northward, and which receives the two rivers, which are mentioned in the claims of the two Nations.

2nd That this Bay extends as a Bay several Miles on a North course above a place called the Devil's Head and nearly eight leagues from the Bay of Fundy, as now known, and there ends in a Body of Waters called Oak Bay.

As the plan of the Survey is before the Board it is needless to enter into a controversy as to the place where Passamaquady Bay and the river Scoudiac meet each other, nor is it of any consequence what is the opinion of either of the Agents respecting it.

The Massachusetts Commissioners in 1784,^b we have seen, agree with the French historians, with all the Inhabitants of the Country at the present day both British and Americans, with the Indians who have been examined as Witnesses on the part of the United States, and with what from the inspection of the Map is evidently the natural distinction, in making the Bay to terminate and the river to commence, at least, as far down as the northern point of St. Andrew's Harbour called *Joe's Point*.

*The Agent of the United States proceeds,

*29

^a Part 3, § 8, 9. [Supra, 140.]

^b See first argument, p. 170, p. 36, p. 178. [Supra, 184, 248, 251.]

3^d That a small navigable river, whereon small vessels may be borne, *at or near high water*, is extended from the west side of *this Bay*, by a flowing tide, west about seven miles, where it receives the fresh water issuing from Scoudiac river, at what is now called Scoudiac Falls.

4th That on the northeasterly side of the Bay there is a river, which the Indians in their language call the Magaguadavic, into which *Vessels of very large dimension* may enter and *find a secure Harbour* at any time of tide, and on which river at or near High-water, *loaded Vessels of a considerable size*, may be carried to a place at the foot of a *Great and remarkable Fall* of fresh water about five Miles from the Bay of Passamaquady.^a

The evident design of these two paragraphs, as well as of the last preceding one, is to give an impression that the Magaguadavic is a larger and more considerable river than the Scoudiac;^b these descriptions however cannot alter the size or importance of the rivers; by attending to the plans of the surveys now before the Board, a just comparison between them may be easily made.

*31¹ *The Agent of the United States goes on to say,^c

Neither of these two rivers can answer to the description of a river having its mouth in the Bay of Fundy, unless the waters called Passamaquady Bay are a part of the Bay of Fundy. Whether those waters were ever known by the name of the Bay or river St. Croix, and by that name distinguished from the Bay Françoise or the Bay of Fundy, may be considered hereafter, if the reply of His Britannic Majesty's Agent shall render it necessary.

It has already been observed^d that the proper mouth of the river Scoudiac is where it empties itself into that part of Passamaquady Bay (which in the Treaty of Peace is considered as a part of the Bay of Fundy,) which was formerly called the Bay of St. Croix, and is now called St. Andrew's Bay; into this same Bay the Magaguadavic also enters.^e

Discussion of
atlases and maps The Agent of the United States next proceeds to his proofs in support of this third part of his argument in the following manner,

‘ In order to shew that the river to which the United States claim is the river St. Croix meant and intended under that name in the treaty, their Agent will proceed to shew that it has from the time of

^a Vide Supplemental argument, p. 46 [MS.].

^b Vide first argument, p. 29, in notes. [Supra, 181.]

^c Page 30 is blank.—EDITOR.

^d § 10. [Supra, 141.]

^e Vide former Argument, p. 145. [Supra, 237.]

^f Vide former argument, p. 51. [Supra, 192.]

^g § 11, 12. [Supra, 141.]

the Charter of William and Mary, and more especially since the treaty of Ryswick, been *noted, marked, called, and claimed* *to, as the river of that name, and that under that *name, designation and mark* was agreed to, *known, pointed out, and fixed upon*, as a part of the boundary described in the Treaty of Peace in 1783. *32

Though there has never been a Map of the interior part of the Country, nor had been a completely accurate Chart of the Sea Coast in the Bay of Fundy or the Bay of Passamaquady before the Chart of Des Barres published in 1789,^a yet those inaccurate Charts, which had before been made, may serve in support of truth in this cause. It is now seen that two rivers and two rivers only, empty their waters into the Bay of Passamaquady,^b that there was no Chart, which was made before that of Des Barres, which exhibits those two rivers with accuracy, as to the real and precise situation of their Mouths, or the comparative size of them with each other, or the Bay which is their common receptacle.

These observations, which apply to all the Maps that are relied upon in support of the claim of the United States, are certainly very just, and enough is here acknowledged respecting their inaccuracy to prevent any the smallest credit being given to any of them in opposition to the local, true and correct designations we find of any of the rivers laid down in them, in the authentic Histories of the Country. In the latter there can be no error or uncertainty, unless the face of nature has been changed since those accounts *were *33 written, which we know is not the case; the former are confessedly so inaccurate that they can be no further depended upon, than as they are supported by and conformable to the latter.

Under the direction of this principle, which can be our only sure guide in determining what degree of dependence is to be placed on any of the Maps of this part of the Country, published previous to the year 1763, it will be proper to proceed in examining the inferences drawn from Maps in this part of the Argument of the Agent of the United States.

The underwritten Agent not having access to these Maps at present and never having seen them but with a momentary glance can only reply to the descriptions of them as given in this part of the Argument, by the Agent of the United States; and will request leave to be more particular in his observations upon them, when they shall be within his reach, if he should find it expedient.^c

The first Map relied upon is thus introduced,^d

^a Vide post, p. 51.

^b Vide Mass. Comm^{rs} report in 1st argument, p. 171 & p. 123 [supra 248, 226], and Map of the Bay before the Board, also Map N^o V. & post, p. 55 in notes.

^c Vide Supplemental argument.

^d § 13, 14. [Supra, 141-2.]

*34 The Agent for the United States will begin by exhibiting the *Chart* made by Cyprian Southack Esq. *very soon after the date of the treaty of Ryswick*, and published in England by Authority about the year 1720. There was in that day *no man who possessed more ability for such a work, who had greater *opportunity to acquire knowledge in the Business, or who for such a Business in a higher degree possessed the confidence of his Country.* Southack before the year 1710 was Commander of a public armed Vessel. In that Year he was appointed by *the special order of Queen Anne* to pilot the fleet which went up the Bay of Fundy against Port Royal. His ability and Character *must have stood very high in public estimation* to have so particular confidence placed in him. He was appointed by the Province as a *Commissioner of Treaties &c^a* and continued in public life until the time of his natural Death, which happened in the year 1745, *as appears by the probate of his will exhibited by the Honorable John Tyng his Executor.*¹ There was no *Chart of Nova Scotia* which contained a tolerable exactness before that of Southack was made. *His observations are critical and his remarks judicious. His acquaintance with the Inhabitants French and English as well as with the Indians, and with the names of the Bays and rivers was intimate and familiar.*

*35 By this *Chart*, a Copy of which as far as relates to this question is herewith offered and the original is before the Board; the Bay of Passimaquady is exhibited *with a competent degree of exactness.* In the Bay appear two rivers and *two rivers only*, the west river of which is marked *by the name of the Passimaquadie*, and the east by the name **of the St. Croix.* It is true that neither of these rivers is, *in his Chart, in that situation in the Bay, where on actual examination its natural situation is found to be; But as there are but two rivers,* which empty their waters into this Bay, as rivers of any consideration, and the *eastern river* on his *Chart* is designated as *the river St. Croix* we can have no hesitation in deciding what river he meant by that name.

One circumstance renders it certain that Southack by the river *St. Croix* meant the *Magaguadavic* and not the *Scoudiac*, that is, that his depths of water in the former agree with what is found there to be at this present day, and what is marked in Des Barres *Chart* to be, very ^b nearly, and not at all with the soundings of that part of the *Passimaquady Bay*, which the *Agent of His Majesty* calls the *Scoudiac*.

The Agent of His Majesty so far from wishing to detract from the Character of M^r Southack is willing to contribute his mite to his

^a "In the winter [1698] John Phillips, Esq. of the council, with Major Convers, and Cyprian Southack, commander of the province galley, went with full powers to conclude a treaty" [with the Indians at Penobscot]. Hutch. Vol. 2, p. 109.

¹ The records of the Division of Maps give the birth and death dates of Cyprian Southack as 1662–1745. These dates are based on the following statement in the Boston Weekly News-Letter of March 28, 1745: "Yesterday morning died here in the 84th year of his Age, Capt. Cyprian Southack, who formerly, for many years, was an experienced and ingenious Sea-Commander. . . ."—EDITOR.

^b The words "to be very nearly" are erased in the Copy filed with the Secretary.

renown upon this occasion, by adding that it appears from Dr Douglass's History, that M^r Southack was in the Year 1720 appointed one of His Majesty's Council *for the Province of Nova Scotia*.^a

But as higher encomiums than have just been recited, upon his abilities as a Surveyor and Draughtsman, could not be bestowed upon M^r Des Barres or any other [of] the most eminent Artist[s] in this line in modern times, the underwritten Agent *cannot refrain to express *36 the disappointment he at first felt, in finding the description here given of M^r Southack's Map fall so far short of his expectations. But upon recurring to the circumstance of the time when it was made, "soon after the date of the Treaty of Ryswick," all the inaccuracies by this description acknowledged to be in the Map were easily accounted for, without any impeachment of the abilities of M^r Southack, as the French were at that time in possession of the Country, and beyond all doubt would have prevented so high an insult to the Sovereignty of their Nation as a survey of the Coast, and sounding the depths of water in the rivers and Harbours within their Dominions, by the Subject of a foreign Power their natural enemy. His Map must therefore have been compiled from the still more inaccurate ones published before his time, with such corrections as his recollection from his sailing up and down the Bay of Fundy in the Province Galley which he commanded in the Year 1698 and occasional opportunities of sketching and sounding, might have furnished him with. It is no wonder then that his Map is not to be depended upon in any respect, which has occasioned Dr Douglass in speaking of it, after mentioning a very erroneous antiquated Map of New England, to express himself thus:—

Capt. Cyprian Southack's land map of the eastern North America is worse; it is as rude as if done by an *Indian*, or as if *done *37 in those ages when men first began to delineate countries; it gives no information, but has no other bad effect, than turning so much paper to waste. *But his large chart of the Coast of Nova Scotia and New England, being one continued error, and a random performance, may be of pernicious consequence in trade and navigation; therefore it ought to be publickly advertised as such, and destroyed, wherever it is found amongst sea charts.*

The underwritten Agent having so fully established in his former Argument, *that the river Scoudiac is the river St. Croix* originally named by the Sieur De Monts in 1604, and referred to and contemplated under that name, from that time down to the Treaty of Peace in 1783, he will in this place content himself with referring to his argument upon that point, which he will now consider as conclusive.

^a Douglass, Vol. 1, p. 328.

The Agent of the United States on their behalf contends that the river *Magaguadavic* is the *true ancient river St. Croix*, "*called by that name from the earliest date of settlement by Europeans there, and that no other river there has been known or called by that name in any Map or public proceeding before the Act of Parliament in 1775,*" and offers this Map of Capt. Southack to prove that the river therein laid down as the river *St. Croix* is the *true ancient and only river St. Croix*,
 *38 referred to and contemplated by the *Historians and in the Documents and public proceedings above mentioned.

This brings the controversy within a very narrow compass. For, as it is agreed that there is but *one Ancient river St. Croix*, and as this Map is confessedly inaccurate with respect to the situation in the Bay of the two rivers laid down in it, the consequence undeniably must be that, by the river marked as the river *St. Croix* in this Map, is intended that *true and only ancient river St. Croix*. Consequently—

That by the river marked as the river *St. Croix* in this Map, is contended [intended] that river which corresponds with the local designation and descriptions of the *true and only ancient river St. Croix* by the Historians and in the Documents, above mentioned, and therefore—

That by the river marked as the river *St. Croix* in this Map, is intended the river *Scoudiac*; as this river alone corresponds with the local designation and descriptions above mentioned.

And as the westernmost of the two rivers laid down in this Map is marked by the name of the *Passimaquady* and the Easternmost by the name of the *St. Croix*, it also follows incontestibly that the river *Passimaquady* is situated to the Westward of the true and only ancient river *St. Croix* corresponding with the local designation and
 *39 *descriptions above mentioned, commonly called the *Scoudiac*; and consequently—

That the river *Cobbesccook* must be the river truly intended under the name of the river *Passimaquady* in this Map; that being the only river emptying itself into *Passimaquady Bay*, Westward of the river *Scoudiac*.

This is the only construction that can be put upon this Map that will make it "serve in support of truth in this cause," for the construction contended for by the Agent of the United States would make the river *Magaguadavic* to be the true only ancient river *St. Croix* ascertained by local designations and descriptions in the histories before mentioned, contrary to the truth of the fact, clearly established, that consistently with those local designations and descriptions the river *Scoudiac* only can be that river.

It is agreed on all hands that no argument can be drawn from the particular local position in the Bay of the rivers as laid down in the Map, because neither of them is placed in that part of the Bay in which the Scoudiac and Magaguadavic are upon examination found respectively to enter it.

Were we to form an opinion *merely* from the inspection of the Map, and there be nothing more in it, material to this point, than what is above stated by the Agent of the United States in *his description of it; the probability is much greater that the Cobbescook and Scoudiac are the rivers there intended to be laid down, than that the Scoudiac and the Magaguadavic are the rivers, because it is a fact acknowledged by the Agent of the United States, that "there never had been a Map of the interior part of the Country," and the river Cobbescook is a large ostensible river at its mouth and empties itself into the Bay of Passimaquady as well as the Scoudiac, with great force and rapidity, whereas it could never be discovered that there is any river, where the Magaguadavic enters the Bay, without the nearest view of & attention to it; and it probably never was known to the English as a river of any considerable extent till the Indians pointed it out to M^r Fletcher and his party in the year 1764. But the underwritten Agent is confident, from his general recollection of the Map, in the momentary view he had of it, that when he shall have had an opportunity to examine it, many other strong reasons will present themselves in corroboration of the foregoing arguments upon it. *40

Another circumstance which strengthens the probability stated above is, that Capt. Southack as a pilot of the first eminence in the Bay of Fundy could not have avoided being well acquainted with the Cobbescook and cannot be supposed under all the circumstances of the case, ever to have seen the Magaguadavic.^a

*But what in fact may be considered as conclusive on this point is that the former supposition is evidently conformable to the truth and the uniform current of authentic History, and the latter is directly the reverse in these respects; "we can therefore have no hesitation in deciding," that the Cobbescook and the Scoudiac are the rivers truly intended in this Map. *41

With regard to *the one circumstance* which is said to render it certain that Southack by the river St. Croix meant the river Magaguadavic, that is, that the Depths of Water marked by him in the St. Croix agree with those in the Magaguadavic, and not with those in the Scoudiac, as marked in Des Barres' Chart, the acknowledged inaccuracy of Southack's Map in other respects in a particular manner renders any

^a Vide Supplemental argument.

inference, drawn from the depths of water marked in it, altogether unworthy of notice.

It is in vain to contend against the foregoing reasoning upon Southack's Map, on any other ground than by shewing that the river Magaguadavic corresponds with the local designations and descriptions above mentioned of *the ancient and only river St. Croix* more perfectly than the river Scoudiac has been shewn to do. And this the Agent of the United States seems to be aware of, and professes himself prepared for the purpose, with "*a great variety of Authors, Maps and Documents* which he has hitherto omitted to produce."

*42 *The Argument on the part of the United States is continued as follows,^a

Having thus considered the Chart made by Southack, and published by authority, the Agent of the United States, will at this time notice, that in the Map published in the memorials of the proceedings of the Commissioners at Paris in 1750 there are exhibited two rivers as running into the Bay of Passimaquady, the Northern or rather Eastern river of which is marked as the St. Croix, and exactly agrees as to its local situation with the river marked by Southack with that name. There are a great number of Maps published between the years 1740 and 1763, some of which are now before the Board, and all of which designate the Eastern river in that Bay as the river St. Croix.

There can be no doubt from what is here stated that many of the English Maps of this part of the Country from Capt. Southack's down to the year 1763 were copied from his, or compiled from the same materials, and upon the same principles; for there is no suggestion or pretence that there was *any actual Survey* of the Coast after his time, by the English till the year 1763; all the arguments therefore that have been advanced to shew the true construction of that Map, will apply to all the others here referred to. The underwritten agent

*43 has in his possession, among other Maps, one of Nova Scotia *published during this period which is contained in a collection of Maps entitled "*A Complete Atlas*" by Emanuel Bowen, Geographer to His Majesty, published in London in the year 1752. This Map so far as it regards the rivers in question fully answers the description given by the Agent of the United States of Southack's Map: "In the Bay appear two rivers and two rivers only, the Western river of which is marked by the name of Pesmocadie and the Eastern by the name of St. Croix"; it is true also of these rivers, that "neither of them is in that situation in the Bay, where on actual examination, its natural

^a § 15. [Supra, 142.]



From A New and Accurate Map of Nova Scotia, Canada, etc.

By EMAN. BOWEN.

(In A Complete Atlas. London, 1752.)

situation is found to be''; but it is clear to a demonstration that by the two rivers in this Map of Bowen's are intended the Cobbescook and Scoudiac, because the Western river is by far the smallest, and extends but a short distance into the Country, and the Eastern is a large river extending far into the Country, terminating in a great Lake or pond near to an Eastern Branch of the river Penobscot agreeably to the description given of the river St. Croix by Champlain. It is therefore impossible that by these rivers in this Map the Scoudiac and Magaguadavic, can be intended. And if Southack's Map shall be found upon examination to correspond in these respects with Bowen's the same inference *upon the same grounds* will be equally incontrovertible.^a In another Map in the same collection but upon a larger Scale than *the Map of Nova Scotia, the Mouths of the same rivers are laid down, that of the river Pesmocadie, emptying itself into the Pesmocadie or Passimaquady Bay near to and about the same distance from Passimaquady Island, that the river Cobbescook, upon examination, is found to enter the Bay. *44

Indeed the river Passimaquady can be ascertained by characteristics almost as certain and indisputable as the river St. Croix itself; It is well known that Passimaquady is an Indian name, and that this name signifies in that Language, as we are informed by the Indians, a place where there are great quantities of the Fish called Pollock; which species of Fish is found about Passimaquady Island, Moose Island and in the contiguous Waters in the greatest and most remarkable abundance.^b All that part of the Bay has therefore been eminently distinguished by the name of Passimaquady, as may be seen by the description of Passimaquady now called Campo Bello Island, in the grant of it mentioned in the former argument.^c In that grant dated 30th September 1767. this Island is thus described; "a Tract of Land situate lying and being, an Island at Passimaquoddy called Passimaquoddy outer Island, bounded on the South East by the Bay of Fundy on the North West by *Passimaquoddy Harbour* and the South West by *Passimaquoddy western Harbour* and on the North East of *Passimaquoddy Bay*." The consequence is therefore* natural and almost necessary, from established usage upon such occasions, that a river so immediately connected with and emptying its waters into this part of the Bay as the river Cobbescook, should be known by the same name of Passimaquoddy, agreeably to the well founded and very judicious observation of the Agent of the United States, "*That* *45

^a Vide Supplemental Argument for a further discussion of these Maps.

^b Vide Mr Currie's [Curry's] Deposition in the Appendix and Supplementary argumen^{ts}. [The appendices are not given.]

^c Vide first Argument, p. 149. [Supra, 238.]

rivers very frequently take their names from the appropriate name of the place the shores of which they lave."^a

^b The Agent of the United States observes upon the Maps alluded to in this part of his argument, that, "in a question *where a line had been anciently settled by agreement of Parties*, or where a practical line had been established by reputation and by possessions an ancient Terrier or survey is considered as an authority by the Laws of Both Nations now here in controversy."

It has been shewn ^c *that the river St. Croix was anciently settled as the line of boundary between New England and the Province of Nova Scotia, by agreement of Parties*, as well as by Royal Charter; and without critically examining into the Law of evidence respecting the admission of ancient Terriers or surveys in proof of Titles in real actions, which is not perhaps strictly applicable upon the present occasion, the underwritten Agent most readily agrees to the introduction of all the Maps in Evidence upon this Trial, that can be exhibited
^{*46} from the **discovery of the Isle St. Croix by De Monts in 1604 down to the present day*; knowing that if truth is on his side they can never injure his cause, and wishing only that justice on either side, may be fully and completely established by the final decision of this Honorable Board.

^d The Agent for the United States further observes in this part of his argument;

Let what river will be now or formerly called the St. Croix, yet the river the Commissioners agreed upon in 1783 *was truly intended by the treaty* as the St. Croix. Now the Agent for His Majesty cannot go from this point, *by attempting to prove*, that the Commissioners agreed upon the Scoudiac as the boundary, *merely by proving* that it was *once* called by the same name as the river which the Commissioners in fact made the boundary. The argument would apply with as great force in proving that the river St. John, or one of the several other rivers, known frequently by the name of St. Croix, was the river agreed to. [The Agent of the United States finds] ^e it necessary for him to meet this kind of reasoning *in its own way*, by shewing that the river, for which the United States contend, has been from *a time long before the Act of Parliament* above mentioned was made, called by the name of the St. Croix; and he contends that if the Scoudiac *was ever before the year 1775* called or known by that name, the Agent for His Majesty ought to shew it.

^a Vide his argument, part 2, § 60. [Supra, 131.]

^b Third part, § 15. [Supra, 143.]

^c Vide former argument, p. 56, 7, 8, 9. [Supra, 196-7.]

^d § 15. [Supra, 143.]

^e The words included in brackets are erased in the Copy filed with the Secretary, and the following words inserted in their stead "But should this be attempted the Agent for the United States will find."

*The first part of the Paragraph has been already fully replied to;— *47
 The underwritten Agent most heartily agrees with the Agent of the United States, that he can never establish his claim to the river *Scoudiac*, *merely* by proving that this river was once called by the name of *Sainte Croix*, and he has therefore fully proved, as he thought it incumbent upon him to do, that the river *Scoudiac* was not *once* merely, but always and invariably known by the name of the river *St. Croix* from its first appellation by De Monts in 1604 down to the Peace in 1783. But he must humbly contend in his turn, that the Agent of the United States cannot establish his claim to the river *Magaguadavic*, *merely* upon the strength of an Indian tradition, brought to light since the year 1763, that this river *is the river St. Croix*; which is the only proof or semblance of proof, yet exhibited of this fact, instead of meeting the reasoning of the underwritten Agent in its own way, by authentic and full proofs and conclusive arguments in support of his claim. The Argument of the Agent of the United States would certainly apply with much greater force in proving the *Penobscot* to be the river agreed to, as this river, besides being once known indiscriminately with the other rivers by the name of *St. Croix*, has been the reputed boundary of Nova Scotia, and was contended for as such by the British *Commissaries at Paris in the year 1750, in their memorials concerning the Limits of Acadia or Nova Scotia, and this Argument would be further supported and confirmed by the Principles laid down in the law of Nations and discussed in another place:^a “That a Cession of a Province to obtain Peace is interpreted *in its most confined sense*.” *48

^b The Agent of the United States proceeds,

This mode of argument is not assumed with an expectation of concluding the Agent for His Majesty to prove, that the river *Scoudiac* was in fact agreed to as the boundary; but as the Agent for the States conceives that there is no evidence as to that *fact*, *he offers these circumstances* to lead to good and sufficient reasons for an agreement by the Commissioners in 1783 to the *Magaguadavic*, for that purpose.

If the underwritten Agent rightly comprehends the meaning of this Paragraph, by “*these circumstances*” are intended Southack’s Map and the other Maps corresponding with it from 1740 to 1763, which have been shewn to add to the already accumulated Mass of evidence in support of His Majesty’s claim to the river *Scoudiac*, as the river *St. Croix*, truly intended by the Treaty of Peace in 1783.

^a Vide First argument, page 184. [Supra, 255.]

^b § 15. [Supra, 143.]

^a The next section of this part of the argument of the Agent of the United States shall now be considered. It is in the following words:

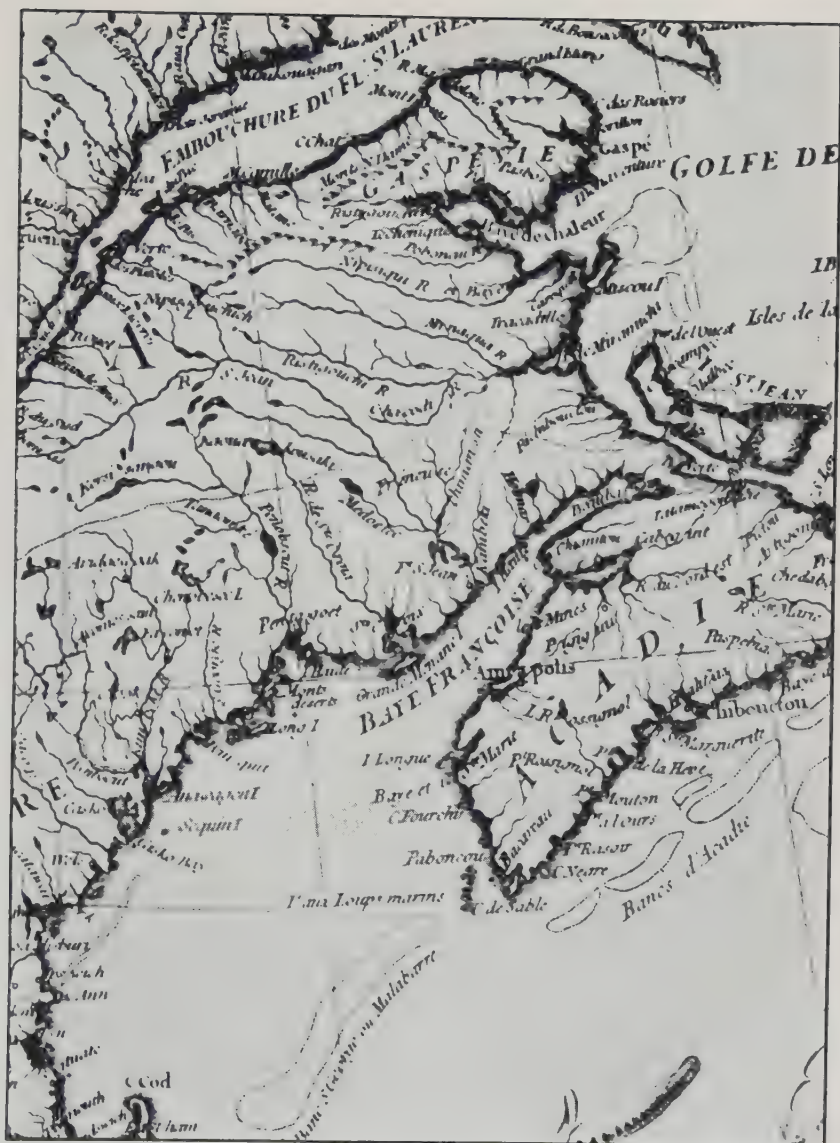
- *49 *When the Commissioners came to settle *the confines of a Nation it was necessary that they should have the lines and extent of it before their Eyes, Charts and Maps are naturally resorted to upon those occasions. In all the Maps which could be offered there were none which gave the Scoudiac the name of St. Croix, excepting two, to wit, Jefferys' Map published in 1779—which calls it Passamaquodie or the little St. Croix. From what authority these rivers were thus marked, the Agent for His Majesty will shew. The other Map referred to is the Chart of Des Barres, published in 1789, six years after the treaty of Peace; where the Scoudiac is marked with a degree of Parade and exultation, as the St. Croix and the other river which had always borne the name is but barely noticed, without any name to it. Every one will at once see, that this was done to serve a particular purpose; and to promote an interested design. Before this Map was published the Act of Parliament of 1775 had been passed. The treaty of Peace had fixed upon the St. Croix as a boundary. Some part of the Country between the Scoudiac and the Magaguadavic was taken possession of by Subjects of His Britannic Majesty, and this controversy had been originated. The Lakes or Ponds of the Scoudiac had been surveyed, or rather a Map made of them by John Jones. As that Map did not exist when the treaty of Peace was made, it could have no influence with the Men who *concluded it.*^b
- *50

The underwritten Agent is at a loss to comprehend the force and meaning of this Section; it is said in it, that, "In all the Maps *which could be offered*," that is, "*to the Commissioners when they came to settle the confines*" upon this occasion, there were none which gave the Scoudiac the name of St. Croix, excepting two, Jefferys' Map published in 1779 and the Chart of Des Barres in 1789, *six years after the treaty of Peace*. As this Chart then could not any more than M^r Jones's Map have been offered to the Commissioners in 1783, it is not easy to conjecture how it came to be introduced in this place unless for the sake of what must be considered a most unmerited Philippic against M^r Des Barres, the accuracy of whose Chart, we have seen acknowledged and even strongly relied upon in another Section of this part of the argument of the Agent of the United States in support of his own claim to the Magaguadavic.

Could M^r Des Barres have deserved to be accused of interested and unworthy motives in publishing this Chart in 1789, because the

^a § 16. [Supra, 144.]

^b This Section is considerably altered in the Copy of the Argument filed with the Secretary, after a copy of this reply had been received by the Agent of the United States.



From map entitled *Amérique Septentrionale . . .* par le S^r D'Anville, 1746.
(In D'Anville's *Atlas*. Paris, 1776.)

Commissioners at Paris in 1783 had fixed upon the Western boundary of the Province of Nova Scotia to be the Eastern boundary of the United States, and of *necessity therefore* mentioned this *River St. Croix* as forming a part of that boundary? But it must be observed here, that altho' the Commissioners in *1783 could not have seen ^{*51} *this* Chart published in 1789, they might have seen and probably had seen the original published by Des Barres in 1778, of which this is a correct copy, tho' upon a different Scale, compiled from M^r Wright's surveys in the year 1772.

And M^r Des Barres would certainly have merited the severest censure had he not supported the truth and accuracy of his Chart by giving to this great river, established as the boundary between the two Countries, its only proper name, simply expressed in the language of the Act of Parliament, "*St. Croix River*."^a

The underwritten Agent not being able to determine what is intended by "*the degree of Parade*," with which this is charged to have been done, or what "*degree of exultation*" M^r Des Barres did it with, or how this was discovered, will not undertake to reply to this part of the charge.

But the great objection to the Chart seems to be, that the river Magaguadavic, "*is but barely noticed without any name to it*"; it is not pretended that it has not its full size and dimensions and depths of Water, quite to "*the foot of the great and remarkable fall of fresh water*," in it. It is true that after an inspection of this accurate Chart, no man would believe it possible, that so diminutive and inconsiderable a river could ever have been established or thought of as a boundary between *two Nations, when compared with the great ^{*52} river *St. Croix* upon the same Chart, which it is not suggested has more than its due size, dimensions and depths of Water laid down. As to the name, as M^r Des Barres knew the name of *St. Croix river* to be appropriated to the river *Scoudiac*, as a boundary between the Provinces of Nova Scotia and Massachusetts Bay, he very properly omitted to give the same name to the river Magaguadavic, altho' known by the name of *St. Croix* among the Indians and ascertained by M^r Wright as *the little St. Croix* in contradistinction to the *Scoudiac* ascertained by him to be the great *St. Croix*.^b

With regard to Jefferys' Map published in 1779 the underwritten Agent not having seen it cannot at present reply. He however requests leave to call the attention of the Board to two Maps of

^a See M^r Wright's Deposition in the appendix, p. 99. [The appendices are not given.]

^b Vide Map N^o V.

North America published by Jefferys in the Years 1750 and 1755 from D'Anville's Map published in 1746, in which the river Scoudiac is clearly laid down, agreeably to its precise situation and position in the Bay, marked with the name of St. Croix and terminating in a lake called *Kaouakasaki*, near to an Eastern branch of the river Penobscot, the same lake in which the river St. Croix in the Map of Bowen, before mentioned, is found to terminate. These Maps tho' upon a small Scale are so accurate that no doubt can be entertained

*53 *that the river St. Croix laid down in them, was intended to represent the river Scoudiac; which from its termination serves to shew that the same river was intended under the name of the St. Croix river in the other Maps alluded to by the Agent of the United States, published between the years 1740 and 1763.^a

The underwritten Agent has nothing particular to reply respecting M^r Jones's Survey or Map of the Western or main branch of *the River St. Croix*, made since the Peace in 1783, as it is acknowledged that it could have had "no influence with the men who made the treaty of Peace," and Maps published before the Peace are professedly the sole object of attention in this part of the argument of the Agent of the United States. M^r Jones's Survey and Map have never been published or offered in evidence here, nor can they be wanted as a Survey and Map made under the orders of the Board are now before the Commissioners.

Monsieur Bellin's Chart published in 1744 was with other plans composed by special directions from the Marine of France, and Carte du Sieur D'Anville was published in 1746, *avec privilège*. These have always been considered as "Geographers of the *greatest eminence* in times of the *greatest credibility*."^b Copies of these Charts are now before the Board, in both of them the river representing the *Scoudiac* is called the *St. Croix*. These Charts have not only been

*54 considered as the most correct by the English Nation, as *appears by their having been adopted by Jefferys, Geographer to His Majesty, in his Charts published in the years 1750 and 1755, and probably many others published before the year 1763 which have not yet been met with, upon the present occasion; but they have been deemed equally authentic and accurate, so far as they respect the present question, by the most celebrated Geographers in the United States, until after the treaty of 1794, under which this Honorable Board is formed. For in the Maps annexed to the first and second editions of the American Geography, published by D^r Morse in the years 1789

^aVide supplemental argument for a further Discussion of these Maps.

^bVide Mem. of Eng. & Fr. Com. p. 69, 71, 265.

and 1793 assisted by Capt. Thomas Hutchins, Geographer General of the United States, the same river representing the *Scoudiac* is laid down, as in D'Anville's Chart, under the name of the *St. Croix*, terminating in a Lake or Pond near the Penobscot, and a North line from this source of the *St. Croix*—marked "Eastern boundary of the United States"—is made to cross no other river, but the river *St. John*, which it intersects at the very foot of the Highlands; and no river is laid down in those Maps as emptying itself into the Bay of Passimaquady except the river *Scoudiac* which is in them laid down under the name of *St. Croix*.^a

But in the third edition of this work published in the year 1796, when no new information could have been obtained upon the subject to justify an Alteration, the river *Scoudiac*, in the Map of the District of Maine annexed to this edition called *Scoudiac River*, is laid down^b as a very small river; and a river on the Eastern side *of the Bay^{*55} evidently intended to represent the Magaguadavic is called the River *St. Croix*, and is laid down as being not only far superior in size to the River *Scoudiac*, but larger even than the *St. John* or *Penobscot*, in which particulars the Map disagrees with the fact even as stated in the work itself.^c A North line from this River, also marked "Eastern boundary of the United States," is made to cross the river *St. John* near *St. Ann's* now called *Fredericton*, and to intersect the river *Miramichi* and almost all the other Rivers that discharge themselves in the Gulph of *Saint Lawrence*.^d

In addition to the before mentioned French Maps there is now before the Board an Atlas of French Maps, intitled, "Atlas Universel Par M^r. Robert Géographe ordinaire du Roy, Par M. Robert de Vaugondy son fils, Géographe ordinaire du Roy, et De S.M. Polonoise, Duc de Lorraine et de Bar, et Associé de L'Accademie Royale des Sciences et belles Lettres de Nancy, avec Privilège du Roy" in which Atlas is a Map intitled, "Partie de L'Amérique Sepent^{le} qui comprend La Nouvelle France ou le Canada, Par le S^r. Robert de Vaugondy Géog: * ordinaire du Roy avec Privilège 1755," in which^{*56}

^a Vide Maps N^o XIV and XV.

^b Vide Map N^o XVII.

^c "There are three rivers which fall into the Bay of Passimaquoddy; the largest is called by the modern Indians the *Scoudick*; but by DeMons and Champlain *Etchemins*. Its main source is near Penobscot river, with which the Indians have a Communication, the carrying place between the two rivers is but three Miles." p. 156. "The French according to their mode of taking possession, always fixed a Cross in every River they came to. Almost every River on the Coast they discovered, has in turn been called *La Rivière de St. Croix*."

"There are three Rivers that empty themselves into the Bay of Passimaquoddy the Easternmost now called *Magacadava*, but always called by the Native Indians and French, *St. Croix*, and the middle one *Schoodac*" &c, ib. p. 380, in Notes. Can D^r Morse mean here that *Magacadava* is not the Indian name of the river?

^d Vide former argument, p. 134, 5. [Supra, 231-2.]

Map not only the River *Scoudiac* is laid down under the name of the *River St. Croix*, terminating in the Lake *Kaouakasaki* near the Penobscot as *its source*; but the other rivers emptying themselves into the Bay of Passimaquady are also laid down, the Magaguadavic, Deggedegwash and Bocoaback as small inconsiderable rivers without names and the Cobbescook under the name of *St. Croix de Truite*.

The underwritten Agent while he forbears to make any further comment upon the above mentioned Map of the District of Maine, in the third edition of the Geography of D^r Morse, cannot refrain from an obvious remark upon the aforementioned Charts of the best *French* Geographers; that the river representing the Scoudiac being in them invariably called *St. Croix River*, abundantly confirms the fact, that this river was the *ancient and original St. Croix of the French*, adopted in Sir William Alexander's Grant as the Western boundary of Nova Scotia.

There are also now before the Board a Copy of the Map published by Nicholas Visscher between the years 1650 and 1700^a *avec privilège des États Généraux*, and a Copy of the Map published by John Senex F.R.S. in the year 1710, in which, in like manner, the river representing the *Scoudiac* is called the *St. Croix*.

*57 *With respect to the assertion that in all the Maps that could be offered, excepting two, Jefferys' and Des Barres, *there were none which gave the Scoudiac the name of St. Croix*; the underwritten Agent presumes with confidence, from the observations and arguments he has already advanced, that no Map will be found in which any river emptying itself into Passimaquady Bay, is called the *St. Croix*, which cannot be shewn to have been intended to represent the Scoudiac.

^b The Agent of the United States next comes to Mitchell's Map, respecting which he says:

There was one Map existing in 1783 which gave a competent and more particular expression of the whole of what had before been the territorial dominions of His Britannic Majesty in North America. D^r Mitchell's Map was published about the year 1747 and gave the appearance of the Country with a sufficient certainty for the Commissioners to rely upon him. There is in that Map and all others that have been published for the Eastern part of Massachusetts, *a failure*, which gives to all *the appearance of incorrectness*. The Scale on which the Country there is represented, is so very small, *that a river cannot be laid down with the appearance of a river, where it ought to be placed*, and covering no greater space on the place than it ought to cover from the compar-

^a Mem. of Eng. & Fr. Com., p. 71.

^b § 17. [Supra, 144.]

ison of its real bigness with that of the Country where it is, or the Bay or waters with which it is connected. Mitchell's Map like all others exhibits two rivers, as emptying themselves into the Bay of Passimaquady, and like them gives the name of St. Croix to the most Eastern River.^a

Language cannot furnish a stronger or more *conclusive argument *58 against a reliance upon any of the Maps produced in evidence in this cause by the Agent of the United States, than presents itself in this very candid description of the imperfection and inaccuracy of D^r Mitchell's Map. Will not any one who reads the second article of the Treaty of Peace, and sees a river, and one river only, marked on Mitchell's Map with the name of St. Croix be instantly convinced, nay is it not a necessary consequence, that this river must have been considered by the Commissioners who formed that treaty as intended to represent the river St. Croix which formed a part of the western boundary of the Province of Nova Scotia, if any regard was had at all to the river St. Croix laid down in the Map?^b And if that was their construction of the Map, can it be of any consequence whether one, two or three rivers are depicted in the Map, either eastward or westward of the river St. Croix, when the river St. Croix forming a part of the western boundary of Nova Scotia, can be ascertained beyond all controversy by local designations and descriptions? Is it not obvious that a *single land-mark* by which the ancient river St. Croix, forming a part of the western boundary of Nova Scotia, can be known with certainty, must countervail, indeed be paramount to, all the fanciful conjectures, for they can be nothing more, that can result from a thousand Maps such as Southack's and Mitchell's are acknowledged to be? In short when a river can be traced by sure marks upon the Earth where it is situated, can its real position upon the face of the Globe, be altered by the inaccurate delineations of an *ignorant or *59 careless Map-Maker? or in other words are Maps formed from rivers or are rivers formed from Maps? for this is the only question that remains to be decided upon Map evidence, which in the present cause can be of no avail, but as it is supported by sure local designations of the true ancient river St. Croix, whether it is considered as forming a part of the western boundary of Nova Scotia or not, it being agreed on all hands that there is *only one ancient river St. Croix*.

Mitchell's map The Agent of the United States again calls °
the attention of the Board to D^r Mitchell's
Map by saying that—

^a There is an addition made to this section in the copy of the argument filed with the Secretary, which will be noticed in a supplemental argument.

^b Vide Supplemental argument.

° § 21. [Supra, 159.]

On the face of it appear to be drawn the boundaries of the United States, as contended for by their Agent—*The Eastern river is marked as the river St. Croix*: and a line is drawn from it to the Highlands. *It is readily seen that the rivers laid down on that Map, were not made from actual surveys, and that the interior part of the Country was then unexplored*, but still the Eastern river in the Bay of Passimaquady is noticed by having the line of division, between the Nations drawn from it. That this line was then drawn and agreed to as a line on and from the river *Magaguadavic*, in the treaty of Peace, and [that that River was] truly intended as the river St. Croix and as a part of the boundary line described, will now be established by the testimony of Witnesses.

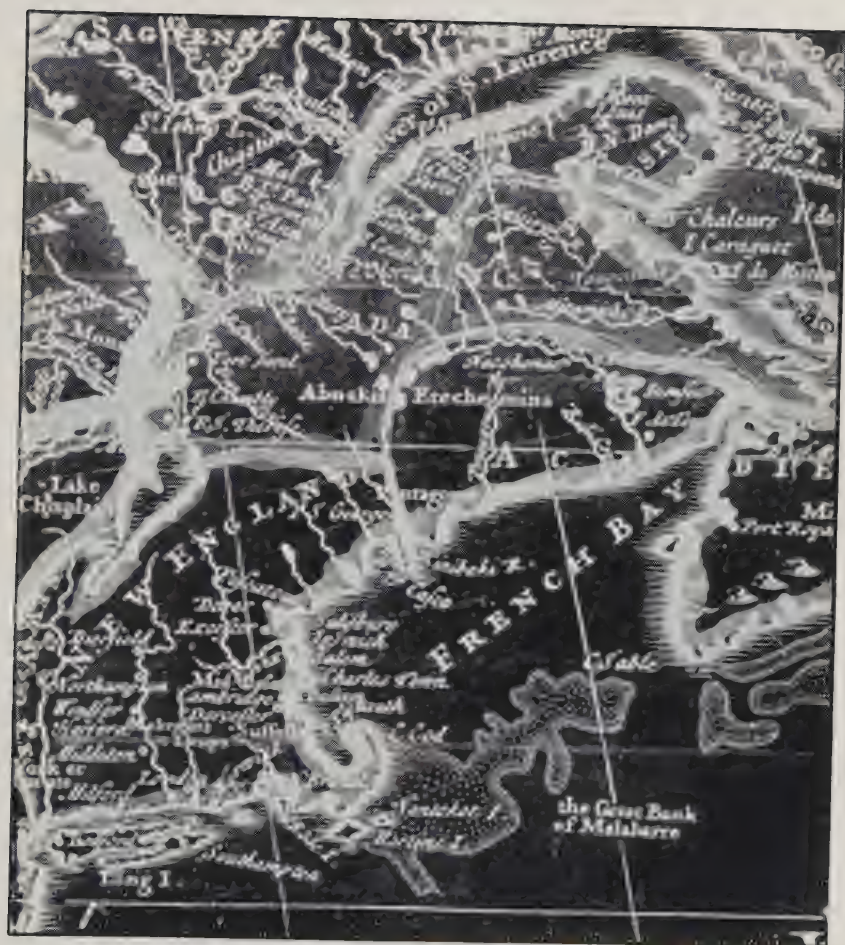
Is the intention of the treaty, clearly expressed, to regulate the decision of the question referred to this Honorable Board, or is parole evidence to be received to control and abrogate the clearest and most
 *60 express *provisions in the treaty?^a

But exclusive of the observations which apply to D^r Mitchell's Map in particular, the underwritten Agent takes leave to remark, that all the reasonings and observations upon Captain Southack's Map apply in full force to D^r Mitchell's, of which the underwritten Agent has had only the same cursory view as of Captain Southack's, tho' he recollects that the *largest* river emptying itself into the Bay, in D^r Mitchell's Map is marked as the *St. Croix*, which circumstance alone is sufficient to determine that *the river Scoudiac* is there intended under that name.

The underwritten Agent has now completed the examination of every part of the argument of the Agent of the United States, which he conceives to be of any weight or consequence in the present controversy. He has endeavoured to shew in this first part of his reply, and he hopes with success, that all the proofs and arguments adduced by the Agent of the United States in support of his third position, which had not been before considered, tend equally with those, to establish on the most impregnable grounds the claim that has been exhibited on the part of His Britannic Majesty.

He has endeavored to shew that no parole evidence can be admitted by this Honorable Board to control or annul the express provisions of the Treaty; that any arguments or inferences derived from Maps can be of no avail, unless corroborated by the sure local designations
 *61 of the rivers intended to be represented *in them, or of any weight against the obvious intention of the treaty clearly expressed; and that the Maps, relied upon by the Agent of the United States, if admitted to have any weight, all tend to prove *the river Scoudiac to be*

^a Vide ante, p. 16. [Supra, 267.]



From a large map of North America. By JOHN SENEX. London, 1710.

the river St. Croix truly intended by the Treaty of Peace, and forming a part of the boundary line therein described; and that the Northwest angle of Nova Scotia intended by the said treaty, is that angle which is formed by a line drawn due North from the furthest source or spring of the western branch of the same river to the Highlands described in the treaty.

Nothing further remains to be done at present by His Majesty's Agent, but to consider in the second part of his reply, such particulars in the Arguments of the Agent of the United States as have been hitherto unnoticed which though not essential to the real Merits of the cause, it may not be proper to pass over altogether in silence; and to add such further observations as may suggest themselves in confirmation of the facts and reasoning already urged in support of His Majesty's Claim.

(b) SECOND PART

*His Majesty's Agent in this second part of his reply, will begin with the first part of the Argument of the Agent of the United States, in which is laid down this point: "That there was not when the treaty of Peace was made in 1783, any Province in His Majesty's Dominions called *Nova Scotia*, founded on a Grant," or as it is afterwards expressed, "*in the Grant to Sir William Alexander in 1621.*"

Nova Scotia in
1783

That there was a Province granted to Sir William Alexander by King James the first in the year 1621, to which the name of *Nova Scotia* was given, and which was particularly bounded and described in the Grant, as is set forth in the Memorial of Claim preferred on the part of His Britannic Majesty, is not and cannot be denied.

Origin of name
and of province

That this Grant was established and confirmed by Letters Patent from King Charles the first in the year 1625 is equally true.

That in the second article of the Treaty of Peace, this ancient Province of Nova Scotia, as bounded in those Charters, is referred to; particularly in the exception, and reservation to His Britannic Majesty, of the Islands that then were or theretofore had been within the limits of the said Province of Nova Scotia is also incontrovertible.

*It is difficult to determine what is intended by the word "*founded*" here made use of by the Agent of the United States.

In the first sixteen sections of this part of his argument he endeavours to prove, that the Country was known by the name of Nova Scotia long before the Grant to Sir William Alexander. With what success shall now be examined.

In the Sections from N° 2 to N° 11, inclusive, after some preliminary observations it is said That "*France* gave the name of *New France*, to that part of America, which it claimed by right of prior discovery, and which lies at the North East of New England at a very early date." That, "the first Colony granted by the English was called Virginia in honor of Queen Elizabeth." And that "The Northern part of the Continent from the 30th. to the 45th. degree of Northern Latitude was called by the name of New England soon after its discovery." That "in the year 1606 the Southern part of what is now called the United States was granted to Sir Thomas Gates and others by King James." That "by the same Charter King James granted to Sir Thomas Hanam & others the territory between the 38 and 45 degrees of Northern Latitude"; that "this Northern Colony was then called New England." That "Gilbert begun a Settlement under that Charter at Sagadahoc in 1608." That "Hutchinson says—That King James the 1st. granted two Colonies and that the

*67 Northern Colony or New England was granted to *Merchants in Plymouth." That Wynne says that "in 1602 the Captains Gilbert and Gosnold sailed from Plymouth to that part of Virginia called New England and built a Fort there." That "in the year 1620 the Charter was granted to the Grand Council of Plymouth extending to the 48th. degree of North Latitude." That "the Agent of the United States considers it as a settled fact that Great Britain made its claim to what is now Canada, New Brunswick and Nova Scotia, on the same principle that it made a claim to the New England Colonies." That "the discovery of Newfoundland was made by Gilbert in the time of Queen Elizabeth and that Gilbert and Gosnold were *in Nova Scotia* in 1603."

To all these facts, without any kind of examination as to the precise regularity or accuracy of the statement of them, His Majesty's Agent yields an implicit assent.^a The inference from them is thus drawn in the 12th. Section. "That it would follow of course that a particular name *should be* given to the Country of which possession was taken and that *it should have* an appellation in some measure resembling the Country or some part of the Country of the first Discoveries, we are led to believe from the uniform practice of that day. The Country as high as the forty fifth degree of North Latitude was called New England at a very early day. This was

*68 done *years* before the grant to Sir *William Alexander.^b *There can*

^a It will however appear upon a critical examination that the facts in several instances are erroneously stated in the Sections here under consideration.

^b *Just seven*—New England being a name given to the whole Eastern Country

be no doubt but that from the analogy of ideas, the Northern situation of the territory, its position in regard to New England and other circumstances which will be conceived without being minutely repeated, it was then and on that account called New Scotland as far as the claim of King James extended."

His Majesty's agent cannot discern any connection between the premises and the conclusion, especially so far as it respects the original appellation of the Country by the name of Nova Scotia. It has been as fully proved in his first argument as the nature of the case will admit, that the name of Nova Scotia originated with the grant to Sir William Alexander in 1621, and altho' the conjecture here is very ingenious, yet as the fact has been shewn to contradict it, and there is not a shadow of evidence to support the conjecture, he cannot admit the origin of the name of Nova Scotia as here contended for; he has no objection however to admit, that the reasons here stated might have had their weight with others mentioned by him, in his first argument, in determining the original appellation of the Province of Nova Scotia in Sir William Alexander's Patent. The case is too clear to admit of doubt, or reasoning upon it.

The French called Newfoundland *Terre Neuve*; from them we retain the former name.^a

"In 1603, De Monts obtained a patent from Henry the 4th of France, for all the country, from the 40th. to the 46th. degree, by the name of *Cadie* or *Acadie*."^b

*By this name the Country was known till Sir William Alexander's Grant, and even since that time, has been indifferently called by that, as well as the name of Nova Scotia.^c *69

When the names that have been given to different parts of the Continent of America by the several European Nations who first visited or discovered them, have been so faithfully and accurately recorded and handed down to us, with their respective dates, it furnishes a *very strong presumption*, at least, if not a conclusive reason, for supposing that no names were given which have not been so recorded and handed down; & yet in the 14th. Section of this part of the argument it is said: "In the Charter to Alexander there was, as there always has been in other Charters for Colonies, a Corporate name given to the Country, which same Lands in all future times

by Capt. Smith in 1614. *Mod. Univ. Hist.* p. 285, Vol. 35. [Supra, 200.]
 "Originally according to Capt. Smith's map, New England extended from twenty miles East of Hudson's-River, northward to the river St. Croix, or perhaps to the *gulf* of St. Laurence." *Doug.* Vol. 1, p. 374.

^a *Doug.* Vol. 1, p. 288.

^b *Hutch.* Vol. 1, p. 2.

^c *Vide* former argument, p. 71. [Supra, 202.]

shall be known by the name of Nova Scotia in America. But it does by no means follow that this was the origin of the name in that part of the Country."

To this it is hoped it is sufficient at present to reply: *Stabit præsumptio donec probetur in contrarium.*

In the 15 Section it is said "*we hear of no other name being given by the English to that part of the country above 45 degrees of Latitude, prior to the incorporation of the New England Company. At which time and by which Act, the whole to the 48th. Degree of latitude was called New England.*"

It seems, according to Dr Douglass, that it might probably have been all called New England *to the Gulph of St. Lawrence* in Capt. Smith's Map in 1614, when the name of New England originated; at any rate the English tho' they *did not give*, knew the name of Acadie, *given to this part of the Country by the French*, and probably as in the instance of Newfoundland, adopted it. But can it be intended here, that if we in reality had heard of no other name to this part of the
 *70 Country before the year 1620, it necessarily follows, that it must before that time have been called and known by the name of Nova Scotia, without any evidence of that name having ever been heard of till the Grant to Sir William Alexander in 1621?

In the 16th. Section it is said—

Wynne in his History page 46 considers Nova Scotia as bounded on New England, and on the 43^d. degree of Latitude, and there is *great reason to believe*, that the name of Nova Scotia, which was extended over the Whole Country from the 45th. to the 48th. degree of North Latitude *was lost in the year 1620*, by the Grant of the whole, to the New England Corporation. And that King James from his national pride as King of Scotland, and to gratify his friends in the Northern part of the British Island, attempted to revive it, in a Grant of a part of the territory to Sir William Alexander in 1621.

The underwritten Agent must here confess himself utterly at a loss to conjecture, what is the "*great reason*" here contemplated, as in his mind, the direct reverse of the proposition has been as fully proved as a negative ever can be proved; it is however a point after all not worth contending for; and it can never effect the merits of this cause, whether these very fanciful and ingenious conjectures are founded in reason or not.

Let it be admitted that this part of the Country was called Nova Scotia, by the Cabots upon their first discovery of it, in the Year 1496. If the same precise territory was so called by them, that was

afterwards described in Sir William Alexander's Patent, it is obvious that the grounds of His Majesty's Claim will be greatly strengthened by the circumstance.

If the territory so called was either more or less extensive than that afterwards erected into the Province ^{*of Nova Scotia}, the erection of that Province by accurately defined limits and boundaries, and the reference to it under the name of *the Province of Nova Scotia* in the treaty of Peace with words evidently shewing that the boundaries of this ancient *Province* of Nova Scotia, were there referred to, must render it a matter of as much indifference whether or not any part of the Country had ever been called by the name of Nova Scotia, between the date of Captain Smith's Map in 1614 and Sir William Alexander's Patent in 1621, the period during which this appellation is contended for, as it is that at the time of the treaty of Utrecht in the year 1713, the Country as far Westward as the river Penobscot was commonly called and known as well by the name of *Nova Scotia* as *Acadia*. *71

In the 18th Section it is said—

We do not find that Alexander had any actual Government or authority in exercise over his Province at any time whatever. Oldmixon ^a an English Historian tells us page 22—that “the Plantation never came to any thing,” that “neither the English nor the Scotch ever perfected a Settlement.”

In Section 20—

From the expedition of the Kirks in 1627 Sir William Alexander had the undisturbed claim to his Province, until the year 1630, but *he had no Settlements there*. One Ship is said to have been sent by him which wintered at Newfoundland in 1623 and afterwards found the Bay of Fundy. *We have no evidence that he ever improved any part of the Soil or carried on any* ^{*Settlements there}. *72

The fact here contended for is, as the underwritten Agent humbly conceives, as little connected with the true merits of this cause as the last that was discussed. It may not be however amiss to state what occurs on the subject, so far as we have any information respecting it.

Governor Hutchinson tells us ^b—

After Argall dispossessed the French in 1613, they [the countries of Acadia and Nova Scotia] seem to have been neglected both by

^a “Oldmixon's (he died anno 1742) *British Empire in America*, 2 Vol. 8^{vo}. London 1708. He generally writes, as if copying from some ill-founded temporary Newspaper. Dr. C. Mather says, that Oldmixon in 56 pages has 87 falshoods [sic].” Doug. Vol. 1, p. 362.

^b Vol. 1, p. 127.

English and French, until the grant to Sir William Alexander in 1621. *That he made attempts and began settlements in Nova-Scotia has always been allowed*, the particular voyages we have no account of. It appears from Champlain that many French *had joined with the English or Scotch*, and adhered to their interest. Among the rest, La Tour was at Port Royal in 1630, *where out of seventy Scots*, thirty had died the winter before from their bad accommodations. La Tour, willing to be safe, let the title be in which it would, English or French, procured from the French King a grant of the river St. John, and five leagues above and five [leagues] below, and ten leagues into the country; this was in 1627. *At the same time he was connected with the Scotch*, and first obtained leave to improve lands and build within the territory, and then, about the year 1630 purchased Sir William Alexander's title. La Tour's title is said to have been *confirmed to him under the great seal of Scotland, and that he obtained also a grant of a baronettage of Nova-Scotia.

*73

In the Memorials of the English and French Commissaries respecting the limits of Accadia or Nova Scotia it is said ^a—

This Grant to Sir William Alexander [in 1621] was confirmed by a Patent from King Charles 1st. dated the 12th of July 1625, which Patent marks out the same Limits.

In consequence of these Grants, Sir William Alexander took Possession of this Country, *made a Settlement at Port-Royal*, and built a Fort there; *and having given Leave to Claude de la Tour, and his eldest son Charles, to improve Lands, and build within the said Territory for their own Advantage; in Consequence whereof they made a Settlement, and built a strong Fort upon St. John's river called Fort La Tour*: In the Year 1630, *in Consideration of their great Expences*, and the Services done by them *in promoting Settlements within that Country*, he conveyed by Deed to the said Claude de la Tour and his Son, and their Heirs for ever, all his Right in Nova-Scotia, *excepting Port-Royal*, to be held under the Crown of Scotland.

And in another part of the same Memorials it is said ^b—

It is evident from Champlain part 2. page 267 *that the English did make Settlements in Consequence of this Grant* [to Sir William Alexander]: For the Memorial here mentioned by Champlain was presented at London in 1631, in which he says *that the English had made settlements at Port Royal ten Years before the Date of that Memorial*. . . . *It is also remarkable, that there remain at this very Day the Ruins of a Fort built at that Time, at the Entrance into the Bason, which preserve the name* *of the Scotch Fort.

*74

^a Memor. page 41.

^b Id. page 441.

In an extract from the Records of the Lords of Trade and Plantations printed in the Appendix to the same Memorials ^a is the following Paragraph:

Before the year 1628, it was brought to pass *by the said Sir William Alexander*, (assisted by both the advice and charge of the said Kirk,) that in the parts of Acadia or Nova Scotia on the South side of the river Canada, *the whole with the Forts thereon built, being by him subdued presently came under the Power of the King of England*, that region on the south side falling into the possession of the said Sir William Alexander, and that on the North side into the possession of the Kirks.

These accounts certainly do not countenance so broad an assertion, as that, "we have no evidence that Sir William Alexander *ever improved any part of the soil or carried on any settlements in Nova Scotia*"; or, "*that we do not find that he had any actual Government or authority in exercise over his Province at any time whatever.*" On the contrary when we find that the whole Country was ceded to France so soon afterwards as the year 1632, by the Treaty of St. Germain, when the Efforts of Sir William Alexander to settle the Province must have ceased of course, and the Effects of the Exertions, that had been made, must have soon disappeared, or engaged no further notice by English historians; there is every reason to suppose, that as great exertions were made, and at as great an expence by Sir William Alexander in settling the Province of Nova Scotia, *while it remained ^{*75} a part of the Dominions of the British Crown as have been made in the settlement of any new Colony.

In the remaining part of the Argument of the Agent of the United States now under consideration from Section 21 to Section 56, inclusive, by the Position in the first Section, "that there was not in 1783 any Province called Nova Scotia, *founded on a grant to Sir William Alexander in the year 1621,*" an idea seems to be intended to be conveyed, that there was no Province of Nova Scotia at all, in the year 1783; for the conclusion of the argument in Section 53 is in the following Words:

Continued force
of grant to
Alexander

That there was a territory called Nova Scotia at that time is not disputed; *but the limits and boundaries of it were then unknown*, and therefore it became necessary *to give it a Western boundary by the treaty itself in these words, to wit, "that angle which is formed by a line drawn due North from the source of the river St. Croix to the Highlands."*

This conclusion is drawn from and grounded upon the proofs exhibited in this part of the argument, to shew that the grant to Sir William Alexander was not in force at the time of the Treaty of Peace in 1783. It is of as little consequence to the present cause, whether the Grant to Sir William Alexander was or was not in force in the year 1783, as either of the last points that have been discussed.

*76 If there was such a grant in 1621, and in that grant the original *boundaries of the Province of Nova Scotia are described, it is sufficient for the purposes of His Majesty's Agent in the present controversy.

But these proofs are principally intended to shew that this Grant to Sir William Alexander was not in force in the year 1691; in order to establish the second position of the main Argument, "that the Crown of England being at that time seized of the Country *without Incumbrance*, granted it to the Province of Massachusetts Bay."

Let us then examine into the truth of the facts, upon which the arguments are raised for this purpose, and the applicability of the law which is relied upon, together with those facts, to warrant the conclusions that are drawn by the Agent of the United States, in support of the Claim he is attempting to establish.

The whole of this part of the Argument is grounded upon the fact stated in the 21 Section, that, "in the year 1630 *Alexander sold the whole* of the Country to Mons^r De La Tour, a Subject of the French King, having first by Letters Patent in 1629, made him a Baronet of New Scotland."

In proof of this fact a Copy of the deed of conveyance, the authenticity of which is not disputed, from Sir William Alexander to Mons^r La Tour is produced, which is certainly the best evidence that can be offered.

*77 But upon examining this deed we find instead of a conveyance of the whole Province of *Nova Scotia, which it is produced to prove, that a very inconsiderable part of the Peninsula, which forms the present Province of Nova Scotia since the erection of the Province of New Brunswick, is included in it.

This deed is dated the 30th. April 1630, Between Sir William Alexander on the one part and *Claude de Saint Estienne Knight, Lord of La Tour and of Vuarre* and *Charles de Saint Estienne, Lord of Deni Court*, his Son of the other part, in which Sir William Alexander "out of the respect and amitie which he beareth to them" conveys to them,

all the Country, Coasts and Islands from the Cape and river of, Jugogon,^a near into the Fouricheu Cape, in the said New Scotland called the Country and Coast of Acadie, following the Coasts and

^a This Cape is now called Cape Jeboque.

Islands of the said Country towards the East into *Port De La Tour*, formerly called *L'Ameroy*, and further beyond the said Port following along the said Coast unto *Merliquesche* neare unto and beyond the Port and Cape of *La Heve* drawing forward fifteen leagues within the said Lands towards the North, which said Knight De La Tour and his said Son shall hold and enjoy, all the said Country, *here above within the said limits named*, from the King and the Succession of the said Crown of Scotland in fief and title of Honor and right of Inheritance, which the said Sir William Alexander to them by the Virtue of the Powers to him by the Patent from King James before recited, hath erected and entitled by two Baronies, namely the Barony of *St. *Estienne* and the Barony of De La Tour, which may be limited and bounded equally between the said Knight De La Tour and his Son if they shall see cause, upon condition, that the said Knight De La Tour and his said Son as he hath promised and for his said Son by these presents doth promise, to be good and faithful Vassals of the said Sovereign Lords the Kings of Scotland and their Heirs and Successors, and to give unto him all obedience and assistance to the reducing of the People of the said Country, *and to maintain good amitie and correspondency with the said Lord Alexander and his Heirs and all his Subjects which shall there be planted and resident, and shall maintain good and faithful Society and Union and the respect due unto the said Lord Alexander &c.*¹ *78

This deed was registered in the Records of the County of Suffolk at Boston 24th. August 1659, when there was a prospect of the restoration of King Charles 2nd. in order, as is said in Section 38 of the Argument now under consideration, to induce the returning Monarch to recognize this Claim founded upon Sir William Alexander's Patent.

Its being registered at this time for this purpose, affords a convincing proof, that this was the only Deed of conveyance, there ever had been from Sir William Alexander to De La Tour.

We see therefore how erroneous Governor Hutchinson's Ideas were of this transaction, in supposing that the whole of Sir W^m Alexander's *title and interest was conveyed by this deed in 1630; as well as in supposing it to have been a purchase, when upon the face of it, it appears to have been a deed of Gift, and the consideration of it is fully stated in the extract from the Memorials just now cited, tho' even in that extract there appears to be a mistake in representing the whole Province, excepting Port Royal to have been conveyed by the Deed. *79

And it would certainly have been a very extraordinary circumstance, if Sir William Alexander after having been at such vast trouble and expence in making settlements within the Province and

¹ For the correct text, see *supra*, 92.

conveying such a number of his Countrymen to settle there, had suddenly granted the whole Country away to these two French Subjects, and forever relinquished all further expectations from it:—accordingly we see, not only by the description of the territory conveyed, but by other parts of the deed that Sir William retained for “himself and his Heirs and all his Subjects, which there should be planted & resident,” those parts of the Province not thereby conveyed away.

The boundaries described in this deed are easily traced at this day. *The Fourichew Cape*, the place of beginning, retains the same name, and lies between St. Mary’s and Cape Sable. *Port de la Tour* is also well known, and is laid down under that name in all the ancient Maps. Mirliguesche and the Port and Cape of La Heve still retaining the same names and lying considerably to the *Westward of Halifax are also well known, and the North line of this Grant or conveyance is fifteen Leagues inland from the Shore back of the line upon the Coast. And this strip of Land between Cape Fourchu and Mirliguesche, is the whole and every part of the ancient Province of Nova Scotia that appears ever to have been granted away by Sir W^m Alexander to De La Tour or any other person. And it is remarkable that in the grant to the Son mentioned in this Deed, *Le Seigneur Charles de ^a Saint Etienne, Sieur de la Tour, Baron d’Ecosse*, Thomas Temple and William Crown, from Oliver Cromwell dated 9th August 1656, there appears to be an evident reference to these boundaries. For the boundaries in Cromwell’s Grant, are not as mentioned in the 38th Section of this Argument above referred to,^b but are as follows “All the Lands and Hereditaments in America herein after declared and limited, that is to say, the Country and territory called Acadie, and part of the Country called Nova Scotia, from Mirliguesche on the East,” (the same eastern boundary that is mentioned in the deed from Sir William Alexander to De La Tour and his Son) “to the Port & Cape of la Heve, following the Sea Coast to Cape Sable and from thence to a certain Port called *Port la Tour*, at the present called Port L’Esmeron,” this doubtless must be the word intended by L’Omeroy, in the other Deed, “and from thence following the Coasts and Islands to Cape Fourchue, and from thence to Cape and River St. Mary &c^a.”

^a Vide Memo. of Eng. & Fr. Com. p. 728.

^b “§ 38. In the year 1656 Cromwell made a grant of the Country describing it as *all of Acadie and Nova Scotia*: the Words were, ‘The Country called Acadie and the Country named Nova Scotia,’ to La Tour, Thomas Temple and William Crown, as far West as Pentagoet and St. George’s river on the confines of New-England.” [Supra, 99.]

N. B. At the Hearing of this Cause, this Grant being referred to, this error was corrected.

round to the Penobscot and the river St. George situate upon the confines of New England."

*It appears by an extract from the records in the Plantation Office, Whitehall, published in the Memorials of the English and French Commissaries so frequently cited by both the Agents in this controversy^a that—^{*81}

About the year 1654, Cromwell having a Fleet at New England, under the Command of one Major Sedgewick, he ordered them to sail to Nova Scotia, and require the French Governor to deliver it, it being anciently a Part of the English Dominion, to which the French had no just Title. Major Sedgewick sailed thither, and found the said Sir Charles de St. Etienne in Possession both of Nova Scotia and Penobscot, both which, together with all the lands belonging to them, the said Sir Charles de St. Etienne quietly resigned; for having suffered great Oppression under the French Governors, he desired to live under the English Protection.

It appears in Beawes's *Lex Mercatoria*^b that:

In 1654 Charles De St. Etienne, Son and Heir to Claude de la Tour came to England and on making out his Claim under Sir William Alexander then Earl of Stirling, Cromwell allowed it, to the Tract of Land taken possession of by Major Sedgewick, and that, on the 20 Sept^r 1656 the said Charles de St. Etienne, sold and conveyed his property in the said Country to Sir Thomas Temple and William Brown [*sic*] who divided the said Land by Deed of Partition.

It is most probable that the agreement for this purchase was made before the date of the Grant, as the Grant was made to all three, which^{*} was the 9th. August, in the same year and that the date of the deed of Partition is here referred to, as being made on the 20th Sept^r.^{*82}

If however this is a correct statement it is not easy to account for this Son of La Tour's having made out a Title to the whole Country, so far Westward as the river St. George, under Sir William Alexander, when so small a part of it was conveyed, in the only deed that appears, that of 1630, unless there had been other conveyances by which Sir William had conveyed to the Father or Son, not only the remaining parts of the Province of Nova Scotia, but the Eastern Province in the Division of the Territory of New England from St. Croix to Pemaquid, which is near the river St. George, which we have before seen^c was assigned to Sir William Alexander in that division. If La Tour had had any such conveyances, it is probable they would

^a P. 579.

^b P. 650, edit. 1771; Mod. Univ. Hist. Vol. 35, p. 277.

^c Vide former argument, p. 56. [*Supra*, 196.]

have been produced to be recorded at Boston in 1659 with the deed of 1630. The La Tours both Father and Son however appear to have been very versatile enterprising Characters, they were good sound Protestants when this Territory was in the Hands of the English, and Stanch Catholics when it was in possession of the French: and if the deed of 1630 can now be considered, as good proof of La Tour's having purchased the whole of Sir William Alexander's Interest in the Province of Nova Scotia, we cannot wonder if it should have been produced to Oliver Cromwell in the Year 1656 as evidence of a Title to the whole of Sir William's property in this Country; who *83 probably was not at the *English Court at that time.

It must be acknowledged there is a Mystery in the different accounts of La Tour's interest in this Country, not easily to be explained by any Documents handed down to us.

Beawes further informs us—^a

That Sir Thomas Temple afterwards, viz. in the year 1662, made out his right and obtained a Patent from the Crown, not only for the *Territory mentioned therein*, but the Government thereof during his natural Life, and the sole Monopoly of the Fishery and Trade with the Indians: that after the Treaty of Breda in 1667, by which this Land was again ceded to the French, in 1670 the possession was delivered to them by Sir Thomas, in virtue of the said Treaty, and in obedience to express orders from the Earl of Arlington, then Secretary of State, *tho' he never conveyed his right to the Lands*, nor ever received a single farthing of £16,200 Sterling then stipulated to be paid him in recompence for his disbursements for building Forts, maintaining Garrisons, and the debts due to him by the Natives, tho' much solicited for, both at the Courts of England and France.

And Sir Thomas Temple previous to delivering up the Country to the French, in a Letter to the Lords of the Council 24th November 1668,^b remonstrates as follows:

*84 I *humbly beseech your Lordship's Pardon, if I presume to inform you that Acadia is but a small Part of the Country of Nova Scotia, being the first national patent regularly bounded in all America, limited on the North by the great River of Canada, and on the West with New England, containing the two large Provinces of Alexandria and Caledonia^c established and confirmed by divers

^a P. 650.—“Anno 1654, after Sedgewick's conquest, M. St Etienne Son and Heir of La Tour came to England, and made out his Claim and had the property surrendered to him. This LaTour sold the property to Sir Thomas Temple who was Governor and in possession till 1662, it was then delivered up to the French by King Charles 2nd who agreed with the Temples for a Sum of £10,000 on account of their right, which was never paid.” Doug. Vol. 1, p. 306.

^b Memo. Eng. & Fr. Com. p. 589.

^c It appears by the Map of Nova Scotia in Purchas, Vol. 4, p. 1872. that the

Acts of Parliament in Scotland, and annexed to the Crown; the Records whereof are kept in the Castle of Edimburgh to this Day; a Country that might be of infinite Advantage to His Majesty and His Subjects were it improved, abounding in good Harbours, Rivers, good Land, Mines, excellent Timber of all Sorts, especially for Shipping, and the Seas abounding with Cod-Fish. The only Revenue at present, (it being unpeopled) is made by Furs and Elk-Skins to the value of £900 p^a ann: of which M^r Elliot receives £600. I had made a beginning to set up a Fishing Trade about three Years since, as your Lordships may see if you please to cast your Eyes on those few Prints inclosed; but the War then breaking forth dashed it wholly, and caused the French, my Neighbours, to make divers Attempts upon the Country under my Command, which, through God's Blessing on my Endeavours, I preserved *at my own proper Cost and Charges*, having not had the least Assistance from his Majesty, but only of this Country, and my Credit with some Merchants, *to whom this Land is indebted £5000 for the same; which causes me in all Humility to beseech your Lordships to consider my sad Condition (in case his Majesty should see Cause to deliver up this Country as his last Letter seems to intimate) being in my old Age, and infirm, reduced to the lowest Poverty and much in Debt, unless his Majesty in his princely Compassion, through your Mediation, order me full Satisfaction for the *great disbursements myself and Friends have been at, for the Lands we purchased and paid for in this Country*; a Breviate whereof I have also inclosed.

*85

Beawes further says—

Sir Thomas Temple died on or about the 27th March 1674, at Brentford in Middlesex, leaving his Nephew John Nelson Esq^r of Boston in New England his Heir and sole acting executor to his Will; who by deed bearing date the 15th April 1731 sold and conveyed all his right, title, claim &c^a in and to the said Lands &c^a to Samuel Waldo of Boston aforesaid, of which the said Samuel Waldo afterwards sold and conveyed an undivided Moiety to me. And as we were conscious of what importance *the settlement of this Province would be* to the Northern Colonies, we secured a number of Swiss Protestants to begin it, not imagining, *after so clear a deduction of our title*, we should have any impediment to so necessary a work, pregnant with innumerable advantages to the Nation. However, lest our right should be futurely contested on account of the *aforesaid several Treaties and changes of possession, we humbly intreated His Majesty about thirteen years ago, to confirm our Grant or to give us a New one; which Petition he was graciously pleased to refer to a Committee of Council, and the Committee

*86

Province of Caledonia was that part of the Province of Nova Scotia on the South side of the Bay of Fundy which forms the present Province of Nova Scotia, and that the Province of Alexandria was that part which now forms the Province of New Brunswick, on the North side of the Bay.

referred it to the consideration of the Attorney and Solicitor General, which being just before the breaking out of the late War, this occurrence made us desist from pressing the affair. But all pretensions to this Colony having been formally renounced on the part of France by the fourth article of the Treaty of Versailles in 1763, our title to Nova Scotia is now confirmed beyond dispute.

In confirmation of the foregoing account we find the Petition of the above named John Nelson to the Lords Justices in 1697, in the following words: ^a

*87 That the said Sir Thomas Temple long since did purchase from one Monsieur Charles De La Tour the Inheritance of Nova Scotia and Part of the Countries called Acadia, and all the Forts, Plantations and Trade thereof to him and his Heirs &c^a which said Countries were first discovered *and planted* by Sir William Alexander, afterwards Earl of Sterling, and others of the Scottish Nation, in the Time of King James the First, and by the Authority of that Crown, the Government and propriety thereof was granted unto the said Earl and His Heirs, &c^a and by him afterwards conveyed unto the aforesaid Monsieur Charles De La Tour to hold under the Crown of Scotland, and by him quietly enjoyed, until the then Commonwealth of England *did in the Year 1654 possess themselves of it, it being in the Hands of a Frenchman, who thereupon coming into England, *and making out his Title from under the said Earl of Sterling, and the Crown of Scotland, his Right was allowed and he restored,* and thereon conveyed his said Right unto Sir Thomas Temple as aforesaid, who enjoyed the same until the Treaty of Breda, did build divers Forts for the Defence thereof, and made other Improvements which cost above £16,000. . . .

That the said Sir Thomas Temple dying, did by his last Will devise all his Right and Title of the Premises unto your Petitioner, who during this present War with France, hath hazarded both his Person and Estate in the Recovery thereof, where through Misfortune falling into their Hands, has been kept a Prisoner in France for these five Years last past, and does yet so continue under Caution; and in the mean Time the said Countries being for the most Part regained by the English, the same hath been by surprise included in the Patent of the Government of the Massachusetts Bay, in New England, &c^a. This being the true State of the Case, and your Petitioner being informed of a Treaty now on Foot between England and France, and fearing that his Majesty for Want of Information should be surprised in this affair, by neglecting or acquitting so considerable a Part of his Dominions and Trade, as well as the propriety of the Petitioner &c^a.

*88 *Your Petitioner humbly prays that your Excellencies will be pleased to make a timely Representation of this Affair unto his Majesty, that such due Care and Consideration may be had thereof, as to his Majesty in his great Wisdom shall seem just and expedient.

^a Memo. Eng. & Fr. Com. p. 617.

This Petition was not, and probably could not be attended to, as in the same year the Country was restored to the French by the Treaty of Ryswick. An application however under the same title derived from Sir William Alexander was afterwards made as we have seen, by the Purchasers of it, M^r Waldo & M^r Beawes, which was attended to, referred to a Committee of the Council, and by them to the Attorney and Solicitor General, but nothing was done upon it, as the War with France so soon afterwards broke out, which terminated in the Peace of 1763.

Thus we see that the Claim to the ancient Province of Nova Scotia under Sir William Alexander's Patent, was never abandoned, quite down to the year 1763, nor was an Idea ever suggested, that it did not remain in full force as to the Territory thereby conveyed, at least till long after the date of the Charter to the Province of Massachusetts Bay in 1691.

There must doubtless have been some defect in the derivation of the Title, perhaps owing to the mistake in supposing the whole to have been conveyed by Sir William Alexander to De ^aLa Tour in the Deed of 1630, or perhaps for the want of a proper conveyance from De La Tour of the title conveyed to him by Sir William: for D^r Douglass tells us ^a that,

La Tour in the various vicissitudes was Protestant when the country was under the dominion of England, and Roman Catholic when it was subject to the king of France. La Tour built a Fort at St. John's river; M. Donnée the French governor of L'Accadie, deemed it irregular and inconsistent with the royal prerogative; while La Tour was in France, he reduced it, and inhumanly destroyed La Tour's wife and family. La Tour became poor, borrowed a large sum of money of M. Belle Isle, a rich merchant and trader to North America, and assigned over to him one half of the province or seigneurie.

^b Aglate La Tour, grand-daughter to the before mentioned La Tour, by management and for small considerations, obtained procurations and quit-claims, from all the heirs of La Tour, and Belle Isle; she married a subaltern officer in Philips's regiment; she went to England and sold the seigneurie or *property of all the province* to the crown of Great Britain, Anno 1731, for 2000 guineas; the sole property of all the province is now in the crown.

We have before seen that the purchase of Sir Thomas Temple's right was made by M^r Waldo in 1731, which might possibly be occasioned by these Steps ^{*}taken by the Grand Daughter of La Tour, ^{*89} in hopes of similar success.

^a 1 Vol. p. 306; Mod. Univ. Hist. Vol. 35, p. 277. The Merchant here mentioned is called *Betishe*.

^b Doug. Vol. 1, p. 327.

But this payment made to Aglate La Tour would lead us to suppose that there must have been some conveyance to De La Tour from Sir William Alexander besides the deed of 1630. Be that as it may, in this manner the title derived under the Patent to Sir William Alexander, and then subsisting, appears to have been finally purchased by, and the property of all the Lands in the Province thereby revested in the Crown, or supposed to be so, and if there was any fraud in this Transaction, the Patent to Sir William Alexander, for aught that appears, is still in force, and a title is still subsisting and uncanceled in his Heirs or Assigns.

It is totally immaterial in the present enquiry, to whom Sir William Alexander's title under his Patent was legally conveyed or whether it was ever conveyed away at all; it is sufficient for all the purposes of this reply, to shew that the Patent remained in force in the year 1691.

As the sole foundation of all the Arguments in support both of the first and second points attempted to be established by the Agent of the United States in this cause, is the above mentioned Deed from Sir William Alexander to De La Tour and his Son in the year 1630, *considered as a conveyance of the whole Territory comprised in Sir*
 *91 *William Alexander's Patent*; it would have been sufficient for the underwritten Agent to shew, as he has done, that a small part only of this territory was thereby conveyed; the foundation being thus destroyed, the whole argument built upon it, must fall to the Ground of course.

But the underwritten Agent conceiving that the Argument is not well founded, even admitting the Deed to be such as it is contended to be, feels it his duty to give it a more particular consideration; he differs with the Agent of the United States in his opinion respecting feudal tenures or the application to this cause of any doctrine resulting from them; but a full discussion of these Points would be as unnecessary as it would be tedious, and laborious, on the present occasion; he will therefore confine himself to such Observations as he conceives will meet the true question now under consideration, viz, whether, supposing the whole of Sir William Alexander's right, property and title under his Patents of 1621 and 1625, had been in fact conveyed to De La Tour and his Son by the Deed of 1630, those Patents thereby became void or the property thereby revested in the Crown.

It appears by the Grant from Oliver Cromwell to La Tour, Crown and Temple in the year 1656, that La Tour was then a Baron of Scotland; he is mentioned therein by the name and description of "Le Seigneur Charles de St. Etienne, Sieur de la Tour *baron D'Ecosse*."

It appears that he at this time made out his title, as derived from Sir William *Alexander and this is confirmed by the similarity we have before observed between the boundaries in the Deed of 1630 and in the Grant from Cromwell, and it cannot be supposed that Cromwell would at that time have admitted the Title of La Tour, if he had not been legally qualified to hold Lands within the British Dominions. *92

The Agent of the United States in the 24th Section of this part of his argument observes:

By the Grant to Alexander, the Title passed to him, his Heirs and Assigns. By the Deed from Alexander to La Tour, the estate passed to the latter, if he was capable of receiving it. *If he was not capable of taking the Estate, Alexander having parted with it, the whole became the right of the Crown again.* But the plan appears from the papers to have been founded on the consent of the two Crowns. *There was an intimate understanding between the two Courts.* Alexander in 1629 made La Tour a Baronet of New Scotland. In this he recites that La Tour had been at great expence, labour and trouble in the Business of Nova Scotia. The April following the Deed was made of the Estate as a fief of the Crown of Scotland.

Agreeably to this it is said in the Memorials of the English and French Commissaries so often cited:

There is reason to believe that previous to the Treaty of Saint Germain, his most Christian Majesty *agreed, that the Sieur de la Tour should enjoy all the Rights and Possessions in Nova Scotia, which had been conveyed to him by Sir William *Alexander; and the Commission under the Sign Manual of Lewis 14th, in 1651, by which Etienne De la Tour, surviving Son of Claude De la Tour, was appointed Governor of all Acadia, confirms to him all his Possessions in that Country in the following Words: "Voulons et entendons que le dit Sieur de Saint-Etienne se réserve et approprie et jouisse pleinement & paisiblement de toutes les terres à lui ci-devant concédées et d'icelles en donner et départir telle parte qu'il advisera tant à nos dits sujets, qui se habitueront qu'aux dits originaires, ainsi qu'il jugera bon être."* *93

Thus it clearly appears to have been, and to be acknowledged to be, the intention both of the English and French Crowns, that La Tour should be fully qualified to take and hold the Lands granted to him by Sir William Alexander, and that such was probably the purport and design of making him a Baronet of Nova Scotia previous to the date

* P. 43—"Our Will and meaning is, that the said Sieur de St. Etienne may fully and peaceably have, hold and enjoy all the Lands heretofore conceded to him, and may give and convey such part of the same as he shall think fit, as well to our said subjects who may become Inhabitants there, as to the said Natives of the Country, and in such manner as to him shall seem meet."

of the conveyance, and what confirms this supposition is that after the treaty of St. Germain in 1632 whereby the whole Country was ceded to France, no new Grant was ever taken by La Tour under the French Crown of the Premises conveyed to him by the deed of Sir William Alexander, altho' he obtained Grants from the French Crown of other
 *94 parts of the Territory comprized in Sir William's Patent *Viz,—“of the Isle of Sables; another of ten leagues upon the sea and ten into the land at La Have; another of Port Royal the same extent; and the like at Menis, with all adjacent islands included in each grant,” and another Grant upon the river St. John.^a

This is humbly conceived to be another sufficient answer to all that is advanced upon this point, by the Agent of the United States.

But waiving even this Ground, let us enquire into the legal consequences of the Grant from Sir William Alexander to La Tour, upon
 Grant from Alexander to La Tour the supposition that he was a mere *Alien*, and *as such* incapable of *holding* real property within the British Dominions.

Upon this question, the Agent of the United States, in the twenty sixth section of this part of his argument observes—“That La Tour was a natural Subject of the French King; and that he could not change his allegiance, without *the consent of His Sovereign*, which he never obtained.”

It is difficult to comprehend the meaning of this after what we have seen advanced in the 24th Section.

The broad Position, that, “the natural born Subject of one Prince cannot by any Act of his own, no, not by swearing allegiance to another, put off or discharge his natural Allegiance to the former”
 *95 without his concurrent Act^b will not *be disputed; but, that the natural born subject of any foreign Prince, may be made a Denizen and thereby *be qualified to hold Lands* within the British Dominions, without the consent of His natural Sovereign is equally undeniable; in the present instance however, it is admitted that La Tour *had the Consent of the French King His natural Sovereign* to take and hold the property conveyed to him by Sir William Alexander.

It is then said in the same Section, “*La Tour was capable of taking, but not of holding*: of consequence the King on Inquest of Office had ought¹ to be resezied of the Territory.” This is admitted to be good Law respecting *Aliens*, but it is equally certain, that *until that Inquest*

^a Hutch. Vol. 1, p. 128. Vide also 26 section of the Argument here under consideration. [Supra, 95.]

^b 1 Blackst. Com. p. 370.

¹ So in the “official Copy”; but, in the same copy, supra, 96, “had ought” (!) is “had a right.”—EDITOR.

of Office had, the Title of an Alien is good against all mankind and the property will descend to his Children, or he may convey it away to another person, in the same manner that any other Subject may convey his property.^a

*It is obvious therefore that the only enquiry to be made, in this case, under the present admissions, is *whether an Office was ever found* against La Tour as an Alien, whereby the Land conveyed to him by Sir William Alexander, was vested in the Crown. To this the Agent of the United States has himself answered in the same Section: *96

There could be no Inquest, because that within two years after the Grant to La Tour, the whole Country was restored to the French King, which rendered an Inquest of Office unnecessary and impracticable. When the whole was ceded to the English by the Treaty of Utrecht, there could be no necessity for a process. The King entered under the Treaty. Alexander's Heirs could not claim *jure postliminii*, for their Ancestor had parted with his title, and La Tour's Heirs could not claim *because they were Aliens*.

Here it is presumed the Law upon the Subject is not as it is stated by the Agent of the United States, as it has been made to appear, that there was no bar to the Claim of La Tour's Heirs on account of their being Aliens; and that the property was not vested in the King, no Office being found, and accordingly the Grand-Daughter and Heiress of La Tour afterwards in the year 1731, did claim the property, and the Crown purchased it of her as has been related. At any rate no title to this property could even as the case is put by the Agent of the United States, be vested in the Crown 'till after the Treaty of Utrecht, and *consequently the Crown had no Interest in the Soil to grant to the Province of Massachusetts Bay in 1691, and therefore it was as has been observed in another place,^b that in the Charter of *97

^a "As the King's Prerogative requires matter of record to bring land to his hands, so it requires matter of record to remove or take it out of him."—Plowden 484. "For the King is a Body Politic of himself, of all others most high and worthy, to whom no freehold or estate of inheritance can be given or conveyed by matter in deed or otherwise, but by matter of record, & by the same reason no Estate of Freehold or Inheritance can be taken or divested out of him by matter in deed or otherwise but by record only." ib. 552, Doctor & Student, 31.

"The breach of a Condition ought to be found by Office before the Entry of the King." Plowden, 213.

"It was resolved [by the Chief Baron and the whole Court of Exchequer] that in Case of an Alien, person attainted so long as he liveth, the King's Villain, Alienation in Mortmain, Condition broken, alienation *contra formam Collationis* and the like, the inheritance or freehold of the Land is not vested in the King till Office found under the Great Seal, for that is an office of intitling." 5 Co. 52 b.

"Offices of intitling and which concern freehold, ought to be by force of a Commission under the Great Seal—therefore in this case an Office found by force of a Commission under the Exchequer Seal is not sufficient to intitle the Queen to the lands of an Alien born." 5 Co. 52.

^b Vide former argument, p. 75. [Supra, 204.]

William and Mary dated in that year there was an express reservation of the rights of all Persons claiming any part of the Lands within the bounds described in the Charter, *by any lawful right or title whatsoever.*

Thus whether it be considered, as the fact is, that there is no evidence of any conveyance of the Territory in question from Sir William Alexander to De La Tour, except of a Strip of Land upon the Sea Coast from Cape Fourchu to Merliguesche;

Or, whether it be considered, as the fact appears to be, that De La Tour was legally qualified to take and hold the property even if the whole had been conveyed to him;

Or whether it be supposed, that De La Tour was *a mere alien* and as such incapable of holding the property, if the whole *had been conveyed*, yet there having been no *Office found*, by which the Property in such case, was vested in the Crown;

It is abundantly clear upon either of these Grounds, that the Patent of the Province of Nova Scotia to Sir William Alexander, was in full force in the year 1691 when the Charter to the Province of Massachusetts Bay was granted and long afterwards, until the purchase made by the Crown of the Territory from the Heirs of De La *98 Tour as the Assigns of Sir William Alexander, if it is not *in fact in force and uncanceled to this very day.

The underwritten Agent cannot see the Connection of the remaining Sections of this part of the argument, either with the merits of the cause or with the point under consideration. The residue of the 26th Section and the Sections from that to Section 37 inclusive, are calculated to prove that De La Tour was a French Subject, and that he held the Lands he claimed in Nova Scotia, from the Treaty of St. Germain in 1632 till the Country was taken by Major Sedgwick under the authority of Cromwell in 1654 as a Subject of the Crown of France; which is most readily admitted.

Every thing conceived to be material in the following Sections to the 47th inclusive, has been already remarked upon.

In Section 48 the Agent of the United States tells us, that he has been thus particular in his relation of the facts in the preceding part of his Argument, "*in order to shew clearly that the Grant to Sir William Alexander was considered as a mere nullity from the Treaty of St. Germain in 1632 and that the boundaries described in it, whatever they might be, were never attended to by either Nation after that period.*"

How this inference can be drawn from any of the facts related by him, the underwritten Agent has not been able to discover; but he *99 trusts he has fully shewn that this Grant to Sir W^m. *Alexander was

considered in the English Nation both by Sovereign and Subjects, as being in full force down to the year 1731.

As the deductions made from this argument in the 50th Section are all except the two last founded upon the erroneous supposition, that the deed from Sir William Alexander to De La Tour in 1630 was a conveyance of the whole Province, they fall to the Ground of course.

The former of the deductions here excepted is in the following Words:

Even if the Claim under that Charter—[Sir William Alexander's], could be supported as resulting from reversion or Conquest it could not be considered as giving a right to the King of England or Scotland in his private Person, and if it reverted to him in his Royal Prerogative, it did not revert as remaining a separate Province or Territory but was immersed in the Crown right and held again as an undistinguished part of his Dominions, until he should recreate the territory into a Province or Colony, by an act of State. If this has been done, the Agent for his Majesty can exhibit the Documents properly evidential of it, and shew how it is connected with the present controversy.¹

In his former argument the underwritten Agent has fully shewn that upon the Cession of the Country by the Treaty of Utrecht to the British Crown, the Government of the Province of Nova Scotia was revived and established under its ancient *boundaries, and that it was so continued until the Year 1783, with the Alteration only of its Northern boundary by the Erection of the Province of Quebec. And as by the Treaty of Peace in 1783 the Province of Nova Scotia is reserved to His Britannic Majesty under its ancient limits, except the alteration in its Northern boundary as aforesaid, which alteration is also expressly recognized in the Treaty, and the Western boundary of this Province is made the Eastern boundary of the United States by the Treaty; His Majesty's Agent conceives it has not only an important, necessary and essential connection with the present controversy, but that it must govern the decision of the question referred to this Honorable Board for their determination.

Government of
Province of Nova
Scotia revived on
cession by Treaty
of Utrecht *100

The Hypothesis upon which the last deduction of the Agent of the United States is drawn, not having any foundation in fact, any reply to it becomes unnecessary.

The Sections next following this part of the argument to the 54th inclusive, have been already answered in the former argument of the underwritten Agent, already before the Board.

¹ Supra, 105.

In the 55th Section the Agent of the United States observes:

Another reason why the Charter to Sir William Alexander, might be considered as of no force, was that all the Grants made by King James, of the Northern part of the Continent, appear to have been abandoned or rather given up or surrendered at a very early date. There was so
 Question of Charters
 *101 *much confusion in their boundaries arising from a want of information, that it became necessary to relinquish these, and to take out new Charters under his Successor: *The Charters afterwards made, refer to the Charter of James to the New England Corporation; but this is done with no other intention, than that of Keeping up the Claim of the English Crown against the French Nation.*

Will not this last observation apply with infinitely greater force to the reference in the Charter of 1691 to the Territory of Nova Scotia? But, not to dwell upon this, this Paragraph furnishes a most convincing argument in favor of a conclusion directly the reverse of that it is intended to support. For there was *no confusion at all* in the boundaries of the Province of Nova Scotia, described in the Patent of Sir William Alexander, it being, as Sir Thomas Temple very justly observed, "*the first national Patent regularly bounded in all America, limited on the North by the Great River of Canada, and on the West, with New England,*" by the river St. Croix the agreed and established boundary between the two Countries, "containing the two large Provinces of Alexandria and Caledonia established and confirmed by divers Acts of Parliament in Scotland and annexed to the Crown." It did not therefore become necessary to relinquish this Patent and accordingly it was never at any time abandoned, given up or surrendered.

*102 This Paragraph also furnishes a full answer *to all the reasoning on the foregoing part of the argument, which has for its object, to shew that, the Patent to Sir William Alexander *not being in force* at the time of the Treaty of Peace, "*the limits and boundaries of Nova Scotia were then unknown.*" For in this Paragraph there is furnished a case in point, of references to the Boundaries of New England under the Charter of James to the New England Corporation or Council of Plymouth, long after it was surrendered, in order to describe and ascertain the Boundaries of subsequent Grants; a notable instance of which is,^a the Patent to the Duke of York of the Saga[da]hock Territory in 1664, in which the St. Croix, the agreed and established boundary between New England and Nova Scotia is referred to, and the Territory is described as "*that part of New England beginning at a certain place called and known by the name of St. Croix adjoining*

^a Vide former argument, p. 64. [Supra, 199.]

to New Scotland"; when the Charter of New England had been surrendered so long before as the Year 1635.

This clearly shews of how little consequence it was whether the Patent of Sir William Alexander was in force or not at the time of the Treaty of Peace, if it ever had been in force, so that the former or ancient limits of Nova Scotia could be ascertained *by a reference to it*. And therefore it is that His Majesty's Agent has considered the first Part of the Argument of the Agent of the United States as altogether foreign *to the true merits of the cause. • ^{*103}

Another reason why he considers it as foreign is, that if it were all well founded in fact, and the limits and boundaries of Nova Scotia had been really unknown at the time of Treaty of Peace, and it had not been intended to bound the United States East upon the Province of Nova Scotia, the direct reverse of all which, it is humbly conceived, has been fully proved; still the same difficulty would remain to be surmounted by the Agent of the United States.

For, let us read the treaty in the sense contended for by him, it will then be as if it stood thus:

The following are and shall be the boundaries of the United States, viz. from that angle which is formed by a line drawn due North *from the source of St. Croix river* to the Highlands &c^a. East by a line to be drawn along the middle of the river St. Croix from its Mouth in the Bay of Fundy *to its Source and from its Source* directly North to the said Highlands.

Here is evidently contemplated *only one river as truly and eminently known and recognized, by the name of St. Croix river*; and the same enquiries must be gone into, under this as under the construction contended for by His Majesty's Agent, to ascertain *the true and only ancient river St. Croix* called and known by that name *from the earliest date of *settlements of Europeans there* ^a and recognized and referred to in all authentic Histories and public proceedings; and in this case too we must find out the source of the river in order to find one of the lines forming the requisite angle to set off from, in tracing the other boundaries. ^{*104}

Now all this has been done, and it has been fully proved that the river Scoudiac, from its mouth to its Source near to the river Penobscot, is, and has been always considered as, *that true and only ancient river St. Croix*; independently of any consideration, whether such a Patent as Sir William Alexander's ever existed or not.

^a Vide argument of the Agent of the United States, part 3, § 7. [Supra, 139.]

But *the intention of the Treaty of Peace* to leave the Province of Nova Scotia entire to His Britannic Majesty, being very clearly and unequivocally expressed, the enquiries to ascertain *this true ancient river St. Croix* have necessarily been conducted with a joint View of ascertaining and identifying at the same time the boundaries of the Province of Nova Scotia; and the precise and exact coincidence of these boundaries, with the boundaries expressed in the Treaty of Peace, even when considered independently of any Reference to the Province of Nova Scotia, serves clearly and fully to confirm this *intention* of the Treaty, at the same time that it establishes beyond all controversy the accuracy and correctness of the result of the *Enquiries upon every principle, that the river Scoudiac is the river truly intended under the name of the river St. Croix in the Treaty of Peace & forming a part of the boundary therein described; and that the angle mentioned in the Treaty as the first Station, from which all the other boundaries are to be traced, whether regard is, or is not had to the limits of the Province of Nova Scotia, is that angle which is formed by a line drawn due North from the furthest source or spring of the western or main branch of the same river to the Highlands described in the Treaty.^a

The second Part of the Argument of the Agent of the United States is grounded upon the following Position:

That by the Charter of William and Mary of 1691 to the Province of Massachusetts Bay, in New England, the whole of the Country and Territory between the river Sagadahock or Kennebeck on the West and the river and Gulph of Saint Lawrence on the North, and on the Atlantic Sea or Ocean on the South, including what is now the Provinces of Nova Scotia and New Brunswick was granted to the said Province of Massachusetts Bay and that no line of division or compact or order of restriction had in the Year 1783 ever been agreed upon or made, by which the same lands were taken from the said Province.

The underwritten Agent has in the course of his preceding arguments endeavoured to answer all the facts, observations and reasoning of the Agent of the United States, which he conceived to be material *upon this point of the cause; and has shewn that Sir William Alexander's Grant was in force as to the territory in question, at the time this Charter was granted; that there is an express reservation of the rights subsisting under it at that time, in this very Charter, and that the Province of Nova Scotia was annexed merely in Juris-

^a For a reply to Sec. 57, vide former argument, p. 141. [Supra, 235.]

diction to the Province of Massachusetts Bay, by this Charter of 1691, without any Grant thereby made or intended or understood to be made of any Interest in the Soil; that this Jurisdiction was dissolved by the Cession of the Country to France, by the Treaty of Ryswick, and that the Crown of Great Britain upon recovering the Territory by the Treaty of Utrecht, revived and established by a separate government the ancient Province of Nova Scotia under its original limits and boundaries, which continued with the alterations before mentioned, 'till the Treaty of Peace in 1783.

He will now proceed to reply to such particulars in this part of the Argument of the Agent of the United States as have hitherto been unnoticed.

There appears to be nothing in this part of the argument, from Section 1 to Section 21 inclusive, which requires a more particular reply than has been already made.

In Section 22 it is said: "The Grant of Cromwell to La Tour and others in the year 1656 was of a Territory called Accadie, bounded on the East by the Gulph of St. Lawrence on the West by the river Pantagoet, and extending from the Sea Northward to the forty eighth degree of Northern Latitude."

*These boundaries of the grant from Cromwell materially differ *107 from those which have been taken from a copy of the original grant, in the former part ^a of this reply, as well as from those mentioned in the 38th Section of the first part of the argument of the Agent of the United States.

In Section 24 it is said: "The Treaty of Utrecht surrendered to the Queen of England the Country of Accadie or Nova Scotia, according to its ancient limits, on this Treaty the Nations both agreed that Accadie or Nova Scotia comprehended the new Province of Nova Scotia." It is uncertain what is meant here by *the new Province of Nova Scotia*, as the French Commissaries in the Memorials referred to in this Section so far from agreeing that Accadia comprehended any Territory ever known as a Province of Nova Scotia, insisted that Accadia comprehended only the Southeastern part of the Peninsula divided by an imaginary line through the Country from Cape St. Marie or Cape Fourchu to Cape Canseau.

In Section 25 it is said: "*That after the Charter of 1691, the Province of Massachusetts claimed the Government over that Territory, will appear from several facts well authenticated.*"

And in proof of this in Section 27, it is said: "Governor Hutchinson tells us in Vol. 1. p. 397," which is put by mistake for Vol. 2. p. 6.—

^a Vide ante, p. 80. [Supra, 300.]

*108 "That Massachusetts considered Nova Scotia as a part of that Province, and had issued Commissions and *instructions, to persons for the exercise of Government there." This is a little different from the original which stands thus.—"*From the time of the conquest of Nova Scotia, the Massachusetts colony had considered the inhabitants as part of the colony, and had given commissions and instructions to persons for the exercise of government there.*"

This therefore cannot be considered as one of the facts by which it appears the *Province of Massachusetts Bay after the Charter of 1691* claimed the Government of Nova Scotia, as it appears to be a claim of the Colony of Massachusetts by virtue of the conquest made by Sir William Phips in May 1690 nearly a year and a half before the Charter of 1691 was dated.

In Section 28, we are told that Governor Hutchinson further says, "that in 1691, one Nelson, was by the Province appointed Governor of the Territory of Acadie and Nova Scotia," and in Section 30, this Transaction is stated at large in Hutchinson's words as follows:

*109 After the conquest of that province by the *Massachusetts Colony* in 1690, the French in Europe gave themselves but little concern about the recovery of it and the English as little about its preservation or security. The Massachusetts were unable to bear the charge of a sufficient military force, to keep the Inhabitants in subjection; They [that is, the *Massachusetts Colony*] gave commissions to judges, justices and other officers, and required oaths of fidelity; and in 1691, gave power and authority to M^r Nelson, *who was bound there from *Boston upon a trading voyage*, to be commander in chief in Acadie; but when he came near the river St. John's, he was taken by Mons. Villebon, who, having a commission from the French king, had been in to Port Royal, and ordered the English flag to be struck and the French flag to be hoisted there, but intended to make St. John's the place of his residence, and took possession of it, where he carried on great trade with the Indians, &c^a.

These are the facts adduced to prove that the Province of Massachusetts Bay after the Charter of 1691 claimed the Government of Nova Scotia.

But upon examination it appears that all this exercise of Jurisdiction was by the *Massachusetts Colony* before they knew any thing of their Charter dated in 1691, and was merely in consequence of "the momentary reduction and possession of the Country by Sir William Phips in 1690."^a

^a Doug. Vol. 1, p. 308. The resolution of the Council of the Province of Massachusetts Bay recited in the 70th Section of this second part of the argument of the Agent of the United States evidently respects that part only of the Province lying between Nova Scotia and the Province of Maine, as described in their Charter.

The Charter of *the Province of Massachusetts Bay* was dated 7 Oct. 1691 and Governor Hutchinson tells us Vol. 1. p. 415, that "Sir William Phips arrived at Boston with the charter, the 14th of May 1692." So that we have no evidence by any one authenticated fact, of any authority or Jurisdiction ever having been exercised *by the Province of Massachusetts Bay* over the Province of Nova Scotia after the date of their Charter in 1691. There is no such evidence in Hutchinson, and the Agent of the United States tells us in Section 29, that "he was *the only Historian* who *had occasion to treat upon the subject." And "that he in his second Volume page 90 says, *We have already taken Notice,*" in the original it is, "*We have taken no notice of Nova Scotia* although included in the bounds of the Massachusetts charter: the inhabitants in general for several years having been under the power and command of the authority sent from France: But this year [1696] the affairs of that, and of the other parts of the government are more interwoven." *110

Thus we see that from the date of the Charter in 1691 to the year 1696, there was no occasion in an History of the Province of Massachusetts Bay to take notice of Nova Scotia, as the Inhabitants there were during that time under the Power and Command of the authority sent from France; that *in the Year 1696, and in that year only*, the affairs of that and the other parts of the Government were more interwoven, as the Province of Nova Scotia was ceded to France the next year 1697, by the Treaty of Ryswick, and remained a part of the French Dominions till restored to Great Britain by the Treaty of Utrecht in 1713, upon which it was revived and established as a separate Government by the British Crown and remained so till the peace of 1783.

Governor Hutchinson goes on to tell us, how the affairs of Nova Scotia *had been* from the date of the Charter in 1691, and *were* in the year 1696 *more* interwoven with those of Massachusetts Bay, in the following Words:

In 1692 soon after Sir William *Phips's arrival, an *attempt was made* by the province, with a *small naval force*, to remove Villebon; *but it proved unsuccessful*. In 1695 Capt. Eams, in his Majesty's ship Sorlings, was sent from Boston to intercept the stores with which Villebon, every spring, had been furnished from France; but the French ship happened to be of greater force than usual, and after an engagement *at the mouth of the river*, Eams was glad to retreat. It seems that, until now, the Massachusetts looked upon themselves as in some sort of possession, and that there had not been an entire revolt of the whole province; for, *this year*, [1696] the general court, from a sense of their inability to protect it, petitioned the *111

crown that the province might be freed from any further expence in the defence of Port Royal, or St. John's, and that garrisons might be kept in both these places, at the charge of the nation. This, perhaps, might be deemed a refusal to exercise jurisdiction over that part of the province and a renunciation of their right; and, accordingly, after the treaty of Utrecht, when possession was returned to the crown, it was settled a distinct province.

These facts too strongly shew that the Province of Massachusetts Bay never supposed, that by their Charter, they had any right to the Soil of the Province of Nova Scotia, and that they solemnly and voluntarily renounced and abandoned their Jurisdiction over, and Right to it before the Treaty of Ryswick, without the exercise of a
 *112 single *Act of Government over it, to require any comment or illustration.

Here it is proper to take notice of the 8th observation or deduction in the 50th Section of the first part of the argument of the Agent of the United States, "That in *the conquest* of 1690 the Crown of England *being seized of the Country without incumbrance*, granted it to the Province of Massachusetts Bay"; whereas it appears clearly that before the date of their Charter in 1691, when Governor Nelson went upon his Trading Voyage, to be Commander in Chief in Accadie, the inhabitants of the Country had all revolted and were "under the Power and Command of the authority sent from France," and as much a French Colony, as if Sir William Phips had never made his conquest.^a

Notwithstanding the foregoing full and clear statement by Governor Hutchinson of the whole connection that took place between the Provinces of Massachusetts Bay and Nova Scotia in consequence of the Charter in 1691, we are told in the 39th Section of this part of the argument of the Agent of the United States, "That the Massachusetts considered this Grant as vesting property in it as a Corporation, that the defence of the Territory was by the Charter devolved on them, and *were really at great expence for its defence and support.*"
 *113 *There is not the smallest evidence offered of any such expence, and it is imagined it will be difficult to shew that any expences were incurred by the Province of Massachusetts Bay after their Charter in 1691 for the Defence and support of Nova Scotia, which were not reimbursed to them by Great Britain.

^a "The French of L'Accadie being troublesome Neighbours, New England fitted out an Expedition of 700 men under Col. Phipps, at their own charge, 1690, they demolished the fort; the French took the oaths of allegiance and fidelity to the crown of England but *soon revolted* in conformity to Roman Catholic and French faith, and continued their settlements. Sir William Phipps's reduction & possession of it may be said to be only *momentary.*" Doug. Vol. 1, p. 307, 8.

With regard to the expence of Sir William Phips's armament in 1690, Governor Hutchinson tells us that "*the plunder was thought equal to the whole expence*," he adds—"but this was conjecture"; which from the nature of the case it must have been, but if this was the general opinion at the time, there can be little doubt of the fact, as "Sir William took possession (as appears by his journal) of the whole sea coast from Port-Royal to Penobscot and the New-England settlements";^a and "The Fleet sailed [from Boston] the 28th of April and returned the 30th of May."

The Agent of the United States after mentioning in Section 42 the Declaration of the English Ministry in 1700, that they had always insisted and should always insist upon the English right as far as the river St. Croix, observes:

This was *a very extraordinary sentiment*, as the Treaty of Breda in 1667 had restored to the French all Accadie and Nova Scotia, of which they had anciently been possessed, and under which Cession they continued in quiet open possession of the Country, as far West as Penobscot, until the reduction of the Country by Phips in 1690. And the treaty of Ryswick in 1697 having restored to them all of which they had ever been possessed; and yet in 1700 the Lords of Trade and Plantations said they **were determined to support* ^{*114} the right of the English to the Country as far East as St. Croix.

This is certainly a very extraordinary observation from the Agent of the United States, when it has been made to appear ^b that the same construction was given to the Treaty of Ryswick by the Province of Massachusetts-Bay as by the English ministry, and that it is highly probable that these Ideas of the English Court may have originated from, or at least, been confirmed by the Representations of the Province upon the Occasion.

But upon a minute examination of the Subject it will appear, that both the English Ministry and the Province of Massachusetts Bay had good reasons for this construction of the Treaty.

The English founded their right to this Country upon the earliest discovery of it, and this right was clearly as good in this instance, as that of any other Nation to any Country claimed upon the same Ground. The French settlements therefore made in the beginning of the last Century by De Monts and others were justly considered as unwarrantable invasions of and Encroachments upon the English Territories in America. When therefore these settlements were known, the French were entirely dispossessed of them by Capt. Argal

^a Hutch. Vol. 1, p. 397; Doug. Vol. 1, p. 307.

^b Vide former argument, p. 86. [Supra, 209.]

from Virginia in the year 1613, and the Bay of Fundy from this circumstance was for a long time afterwards known by the name of Argal's Bay. This Expedition of Argal's, Doctor Douglass observes ^a "made way for Sir William Alexander's Patent." The Country remained from this time in the possession of the British
 *115 Crown *till the Treaty of St. Germain's in 1632, by the 13th Article of which, "all the places possessed in New France, Canada and Accadia are restored by Great Britain to the Crown of France." ^b Upon this Treaty Governor Hutchinson observes that ^c "The frenchified Court of King Charles the first would, at the treaty of Saint Germain's, have given up any claim to Massachusetts bay as readily as they did to Acadie; for the French could make out no better title to Penobscot, and the other parts of Acadie, than they could to Massachusetts."

The Country or Territory of Accadie was at this time quite undefined as to its boundaries, and indeed always remained so, and was extended or contracted as best suited the Views of the French Court from time to time.^d

We find that the Massachusetts Colony refused to give up their possessions at Penobscot in consequence of the Treaty of St. Germain's, conceiving that the French had no right to them under that Treaty.

This place was plundered by the French in 1632.^e But Governor Hutchinson tells us,^f that "the Plymouth people, notwithstanding the French piracy in 1632 kept possession of their house at Penobscot, and carried on trade with the Indians; but [that] in 1635, Rossillon, commander of a French fort at La Have upon the Nova Scotia shore, sent a French man of War to Penobscot, which took possession of the trading house and all the goods."

Thus was Penobscot forcibly taken possession of, by the French, in a time of Peace in 1635 under a pretence of its being a part of Acadie
 *116 ceded to the *French Crown by the Treaty of St. Germain's, and from this time the Country as far West as Penobscot remained in the possession of the French, till the Conquest of it by Sedgwick in 1654.

It is said in the Memorials of the English and French Commissioners ^g that "It appears from the 25th Article of the Treaty of Westminster in 1655 that in the Year 1654 these Forts *Pentagoet*, St. John's, Port Royal, and La Heve were claimed by France, at the Treaty of Westminster, as *Forts in Acadia*; but by the 25th Article of

^a Doug. Vol. 1, p. 305.

^b Memo. Eng. & Fr. Com. p. 401.

^c Hutch. Vol. 1, p. 30.

^d "Acadie has been stretched and contracted at different times, as the French found it to serve their interest." Hutch. Vol. 2, p. 110.

^e Hutch. Vol. 1, p. 29.

^f Ib. p. 46.

^g P. 403.

the Treaty of Westminster this Matter is referred to the Consideration of Commissaries who were to be appointed by that Treaty."

Here we find that in 1655 the limits and boundaries of Accadia still remained uncertain and disputed.

Nothing was done in consequence of the Treaty in 1655 and thus matters remained until the Treaty of Breda in July 1667 when Accadia was restored to France, under the name of "the Country called Accadia situated in North America, which his most Christian Majesty did formerly enjoy." ^a

Now it appears that His most Christian Majesty had not formerly of right enjoyed under the Treaty of St. Germain's the Country so far Westward as the Penobscot and that the right to Penobscot was uniformly contended for by the Massachusetts and New Plymouth Colonies till the French were dispossessed by Major Sedgwick in 1654.

Accordingly Sir Thomas Temple at that time Governor of the Territory refused to deliver up Penobscot claimed *by the French ^{*117} Crown under this Treaty, until King Charles the second at this time under the same influence of the French Court as his Father had been at the Treaty of St. Germain's in 1632 gave an express order to Sir Thomas to deliver up the Fort of Penobscot, by name, to the French; which was accordingly done.

In the year 1690 during the War then existing between Great Britain and France, the Country was taken possession of, as we have seen, by Sir William Phips.

By the Treaty of Ryswick all places taken during the War were mutually restored and the *Settlement of limits* was referred to Commissaries to be appointed. ^b

Here again it appears that altho' Acadia was one of the places to be restored under this Treaty still its limits were uncertain and to be settled by Commissioners to be appointed for the purpose. In the year 1700 some proposals were made on the part of France ^b to the Court of Great Britain respecting the limits between the French and English Territories in North America; but *no boundary was settled* in consequence of these proposals.

The question respecting the limits of Acadia ceded by the Treaty of Ryswick being thus unsettled and uncertain under that Treaty, and the matter being open for negotiation by Commissioners, and the pretensions of France being so ill founded to any part of the Country West of the River St. Croix, as a part of Acadia; can it be wondered at, that the Province of Massachusetts Bay, should be very assiduous

^a P. 409.

^b Memo. Eng. & Fr. Com. p. 419.

and importunate in their applications to the English Ministry, and
 *118 that the *Ministry should be determined in the year 1700 to insist upon the English right as far as the river St. Croix? ^a

Much more reasonable, most certainly, were these claims of the British Ministry under the Treaty of Ryswick than the pretensions of the French afterwards under the Treaty of Utrecht, that Acadia or Nova Scotia comprehended only the Southern part of the Peninsula from Cape St. Mary's to Cape Canseau.

The discussion of this point, it is acknowledged, is foreign to the merits of this controversy, but became in the opinion of His Majesty's Agent in some degree proper, in consequence of what he conceived to be an unmerited observation upon the sentiments of the British Ministry in 1700 respecting the construction of the Treaty of Ryswick.

It remains only under this Head of the argument to remark one other striking singularity in the 63^d Section, in which the Agent of the

L'Escarbot's description of Isle St. Croix United States apparently aware that the very minute and accurate description given by L'Escarbot of the

Isle St. Croix, from which the river took its name, must incontrovertibly establish the river Scoudiac to be the river St. Croix contemplated in this History, affects to consider this account of the Country as merely fabulous and tells us—

This account of L'Escarbot may, or it may not be correct; The circumstance of *name* happened *two years* before he came to America; De Monts by that time had fallen into disgrace in the Court of France; and L'Escarbot was more immediately attached to Monsieur De Poutrincourt. *He might* therefore be left to *his conjecture*,
 *119 in regard to the origin of the name of the *Place where De Monts had landed, or, he might have taken it from the vague and uncertain reports of Sailors and Voyagers, who were pursuing marvellous things in an age of darkness superstition and credulity.

Let any Man read L'Escarbot—and he will at once see how little foundation there is for such observations as these; among other things we find in his Voyage a minute and particular account of his own personal visit to the Isle St. Croix.^b

But we have seen that the Agent of the United States, in another part of his argument, sets up, and indeed rests his whole cause upon

^a It is worthy of remark, in this place that in the opinion given by the Attorney and Solicitor General in England, in the year 1731, a document strongly relied upon by the Agent of the United States and which is stated in the former argument p. 90—they expressly say that the Country between Kennebec & St. Croix "had never been yielded by the Crown of England to France by any Treaty." Vide appendix, p. 152. [The appendices are not given.]

^b See appendix N^o 1. [The appendices are not given.]

the Maps of the Country made by Capt. Southack and others,—which are at the same time acknowledged to be so inaccurate that they give no just Idea of the position or situation of the rivers laid down on them,—as clear and decisive Evidence that the Commissioners at Paris in 1783 under the name of the river St. Croix, in the Treaty of Peace, intended the river Magaguadavic.

That L'Escarbot's History is authentic and entitled to the fullest credit has never till now been denied, and it is most implicitly relied upon both by the English and French Commissaries in the Memorials so often alluded to, as well as the History of Champlain, a co-temporary writer of undoubted credit and concurrent authority upon the same points. Every man capable of forming a Judgment of the merits of an author, and who has read L'Escarbot's Book, will pronounce him a Man of respectability as a Scholar and as an Historian.*

*No man who knows anything of the Geography of the Country, can examine the Maps relied upon by the Agent of the United States, who will not pronounce them extremely inaccurate, tho' he will at the same time discover such appropriate Characteristics in all the Rivers marked with the name of St. Croix, even in these inaccurate Maps, as will satisfy him, that they were intended to represent the river *Scoudiac*. *120

The Sections in the third part of the argument of the Agent of the United States from Section 22 to Section 30 inclusive have not yet

* Un avocat de Paris, nommé Marc Lescarbot, Homme d'esprit, et fort attaché à M. de Poutrincourt, avoit eu la curiosité, peu ordinaire aux Personnes de sa Profession, de voir le Nouveau Monde, et servit beaucoup à mettre, et à maintenir les choses dans cet heureux état. Il animoit les uns, il picquoit les autres d'honneur, il se faisoit aimer de tous, et ne s'épargnoit lui-meme en rien. Il inventoit tous les jours quelque chose de nouveau pour l'utilité publique, et jamais on ne comprit mieux de quelle ressource peut être dans un nouvel Etablissement, *un esprit cultivé par l'étude* que le zèle de L'Etat engage à se servir de ses connoissances, et de ses réflexions. *C'est à cet Avocat, que nous sommes redevables des meilleurs Mémoires, que nous ayons de ce qui s'est passé sous ses yeux, et d'une Histoire de la Floride Française.* On y voit un Auteur exact, et judicieux, un Homme, qui a des vues, et qui eût été aussi capable d'établir une Colonie, que d'en écrire L'Histoire." Tom. 1, Hist. Nouv. France, B. 9, p. 119, [in the Ganeau edition, Bk. 3, p. 185] P. Charlevoix.

A Barrister of Paris, named Marc Lescarbot, a man of Genius and much attached to M de Poutrincourt, had the curiosity seldom found among Persons of his Profession, to see the new World, and contributed much to the Establishment and maintenance of this prosperous condition of things. He encouraged some, stimulated the Honor of others, acquired the Love of all, and on no occasion spared himself. Every day he suggested something not before thought of for the common benefit, nor was there ever an instance in which were better exemplified the resources that, in a New Settlement, may be found in one whose mind has been cultivated by study, and is prompted by public zeal to avail himself of his knowledge and Reflections. To this Barrister we are indebted for the best accounts we have of what passed under his Eyes, and for a History of French Florida. We there see an author exact and judicious, and a man of Extensive views who would have been no less capable of founding a Colony, than of writing its History.

been noticed: It has indeed been found impossible satisfactorily to account for their being introduced. One design seems to be to apolo-

Examination of
third part of Mr.
Sullivan's
argument

gize to the Inhabitants settled Eastward of the River Scoudiac, for "the *Seriousness and Zeal* with which the Claim of the United States has been urged against the Government of Great Britain"; and in full

confidence that this Claim to the river Magaguadavic as the true St. Croix has been fully supported and established by the proofs and

- *121 *reasoning offered in the arguments here drawing to a close, one of the avowed purposes of these Sections is to reconcile these Inhabitants to their misfortune in being turned out of their Estates and possessions, upon which they have so imprudently expended their labour and substance the last thirteen Years, under the faith of the British Government pledged to them, that the river Scoudiac was the river St. Croix truly intended under that name in the Treaty of Peace; obstinately refusing to give credit to M^r John Allan Superintendent of Indian Affairs for Massachusetts, who by his several Letters dated 11th August, 3^d September and 15th December 1783 "informed the People who resorted to St. Andrews under the English Claim that they were quite mistaken and were within the State of Massachusetts."

A Reply to these Sections in this sense of them the underwritten Agent fears would require a much more serious apology than it would be in his power to make to this Honorable Board for its impropriety.

And he is equally at a loss to reply to the testimony offered in these Sections, as being "evidence of the continuation of an old claim, and evidential of the truth of the proposition, that the Commissioners at Paris in 1783 by the river St. Croix mentioned in the Treaty, truly meant and intended the river called by the Indians the Magaguadavic."

- If it could be shewn that a Copy of M^r John Allan's first Letter *to the people at St. Andrews*, dated 11th Aug^t 1783 had reached the Commissioners at Paris before the Treaty was signed on the 3^d September and that it *contained facts or arguments tending to prove that the river Magaguadavic was *the true and only ancient river Saint Croix*, there might be some reason for introducing it as evidence of what river they might have been led to suppose to be the river St. Croix. But how his Letter of the 3^d September written here on the very day the Treaty was signed at Paris; or his Letter of the 15th December following; or the resolve of the General Court of the State of Massachusetts the 3^d of October in that year "requesting the Governor to
- *122

obtain an authenticated state of facts, respecting these peoples settling at St. Andrews and to lay the same before the General Court"; or the conversation between M^r Dexter and the Governor and Surveyor General of Nova Scotia in September of the same year; or the Testimony of M^r John Albee, that he warned those Settlers to depart on their first Entry; or the subsequent Records of the State of Massachusetts and of Congress; or the Report so called in 1789 of M^r Morris Surveyor General of Nova Scotia, can be "evidential" of the intentions of the Commissioners at Paris in 1783, the underwritten Agent confesses himself not to be able to comprehend.

He therefore can only say that if he could have supposed such Testimony admissible, as "evidential" of the Intentions of the Commissioners at Paris in 1783, he would have offered in his Turn, the Letters of His Majesty's principal Secretaries of State written from time to time since the Treaty of Peace by His Majesty's order, to His Governors of the Provinces of Nova Scotia and New Brunswick; the Letters of those Governors; the Acts of Assembly of the Province of New Brunswick; His Majesty's Letters Patents, *under the Great Seal of each of the said Provinces, and many other documents "evidential" of the Truth of "the Proposition that the Commissioners at Paris in 1783, by the river St. Croix mentioned in the Treaty, truly meant and intended the river called by the Indians *The Scoudiac*." *123

It must be obvious that nothing which has taken place since the Treaty of Peace can affect this controversy, or the decision of this Honorable Board upon the present occasion. If any of the documents or proofs here referred to by the Agent of the United States contain any arguments or facts evidential of what river *is the true ancient River St. Croix, forming a part of the Western boundaries of the Province of Nova Scotia at the time of the treaty of Peace, & consequently* evidential of the Intentions of the Commissioners at Paris in 1783, those arguments and those facts are certainly very proper to be made use of; but they must stand or fall by their own merits or demerits, and can derive no additional weight from the *dictum* of one or more Individuals of either Nation, or from any sanction they may have obtained from the Governments of either of the Countries that are Parties in the Cause.

The underwritten Agent cannot refrain from making one or two remarks upon the 28th Section in which it is said: "The report of Charles Morris Esq Surveyor General of Nova Scotia made in the year 1789 *did much towards a continuance of the Wrong.*" This paper is not an official Report of M^r Morris as Surveyor General of Nova

Scotia but merely contains some observations made by him at the
 *124 instance of a private * Individual and never intended to be made use
 of as a public paper on any other occasion than that for which they
 were penned. The original has been some years in the possession of
 His Majesty's Agent, who is well pleased to see its contents introduced
 in evidence in this cause; and should have offered it himself had he
 conceived it to be admissible.* But how it can be said that this
 paper "*did much towards a continuance of the Wrong*"; or how it can
 be maintained that, by this

paper or Report it appears *that the Government of Nova Scotia*,
 [which had no longer any concern in the question] at that time had
 no determinate idea, whether to fix on the Cobbescook or Scoudiac,
 as the river *they* intended to claim, to enforce the Treaty, as the
 river St. Croix, and that there was at that time on that side of the
 question no value, estimate or dependance placed either on the Act
 of Parliament of 1775, in the Map of Des Barres, on any ancient
 Chart, or any Tradition or reputation by themselves then known,
 respecting either of these two being called the St. Croix river.¹

How these things can be said and maintained are mysteries which
 His Majesty's Agent must leave to the Agent of the United States to
 explain.

It is further said in the 29th Section:

The report of Morris and what he said to Dexter in 1783 shews
 how much he was mistaken in another point when he said that
 Governor Bernard fixed upon Cobbescook which he (Morris) called
 *125 the little St. Croix as the boundary,^b *whereas it has been made
 fully to appear from good substantial *proof*, that Governor Bernard
 received his Grant from the Governor of Nova Scotia upon an
 Idea, that the Government of Massachusetts would finally relin-
 quish all those Lands East of Penobscot to the Crown.

* As the Copy of that part of it which is cited by the Agent of the United
 States, is inaccurate, a copy of the whole from the original will be annexed to this
 argument for the Information of the Board.

^b "Bernard therefore proposed to obtain a grant from the province of Nova
 Scotia: in order to do which it became necessary to throw the territory coveted,
 under the jurisdiction of that government. To effect this, he called to his aid a
 number of influential characters, and had a survey made by one Morris, a sur-
 veyor of Nova Scotia. The hundred thousand acres were laid out on the south
 of the Shooduck, and marked for Francis Bernard, John Mitchel, Thomas
 Thornton, Richard Jackson, & James Morris. In order to *carry the land into*
Nova Scotia province, it was *necessary* to bring the *St. Croix* to the west of the
Shooduck. Morris, therefore, in forming his map, marked the Cobscook with the
 name of St. Croix." Sullivan's History, p. 41. Vide former Argument, p. 161.
 [Supra, 244.]

Why was it necessary to bring the St. Croix to the Westward of the Shooduck
 upon this occasion in 1765, unless because it was known that the St. Croix was
 the ancient western boundary of the Province of Nova Scotia, or in other words
 the Eastern boundary of Massachusetts?

¹ See supra, 163, for correct version of this quotation.—EDITOR.

What M^r Morris said to Dexter in 1783 does not yet appear; but upon examination we find this proof to be—1st a Letter from the Lords of Trade to Governor Bernard in 1763, copied at length in the preceding 53 Section in which it does not appear that Governor Bernard at that time had any further Grant of Lands, than the Island of Mount Desert, referred to in that Letter, in contemplation, and 2^{dy} some observations of the Agent of the United States upon this Letter, which shall be transcribed in this place. They are in the 55th Section of this part of his Argument:

These sentiments of the Lords of Trade connected with the Idea of their established influence in plantation concerns could not fail to render the Lands between *Kennebeck* and *St. Croix* an object of Speculation. By the foregoing correspondence between Bernard & the Lords of Trade, *and perhaps by other apt and persevering communications, which must of course be kept secret, from the Province, he and his Friends and Associates, well understood the Plan of the Ministry, in regard to this Territory.*

It is not easy to discover any connection between this insinuation and Governor Bernard's Grant from the Governor of Nova Scotia;—whatever Governor Bernard's Ideas might have been about this Territory, it appears by the shewing by the agent of the United States himself that the Territory was not contemplated to extend *eastward *of the St. Croix*; and it has been fully shewn that Governor Bernard did not mean to have his Grant in this Territory, but to the eastward of it, and clearly within the limits of the Province of Nova Scotia. *126

But, says the Agent of the United States in this place, "Governor Bernard had no authority to establish a boundary; he was not appointed for that purpose, nor would he *then* have been considered by the General Assembly as a suitable Agent in that business."

His Majesty's Agent so far from contending that Governor Bernard had authority to establish the Cobbescok as a boundary, has most clearly proved that not only Governor Bernard but Governor Wilmot and all the Officers of the Government of the Province of Nova Scotia at that time were mistaken in supposing it to be the true *St. Croix*, the original western boundary of the Province, mentioned in Sir William Alexander's Patent in 1621.

But this last observation of the Agent of the United States ill accords with his sentiments in a former part of this very argument, Section 18, in which Governor Bernard's instructions to M^r John Mitchel in April 1764 to survey the river *St. Croix*, in order to procure a Grant of the Tract of Land he wanted for himself and Friends within the limits of the Province of Nova Scotia, are called an Asser-

tion "by the Government of the Province of Massachusetts Bay of its claim to the river Magaguadavic as the river St. Croix."

His Majesty's Agent cannot close the present argument without acknowledging in the fullest Terms the extreme Candour with which
 *127¹ the Agent of the United States * has brought under the consideration of the Board, the documents contained in the several parts of his argument, whether favorable or not to the Claim he is endeavouring to establish.

It is not to be wondered at, indeed it is a necessary consequence, in a case like this, where by examination and enquiry the truth can be fully come at, that every authentic Record, every former account of the Country founded in fact and entitled to credit, should tend to confirm and establish that claim, which has truth and Justice for its Basis. It has therefore happened in the foregoing Investigations, that those Records and accounts have all conspired to prove the river Scoudiac to be the river St. Croix truly intended by the Treaty of Peace and forming a part of the boundary therein described, and the Northwest angle of Nova Scotia therein mentioned to be formed by a line drawn due North from the furthest Source or Spring of the western Branch of the same river to the Highlands described in the Treaty.

*129 **Observations on the Western Limits of that Part of Nova Scotia now called New Brunswick, by Charles Morris Esq. Surveyor General of Nova Scotia*²

M^r Bernard the Governor of Massachusetts-Bay in the year 1764 caused a Survey of the Bay of Passamaquady to be made and proposed making Grants of Land as being within his Government.^a The next year M^r Wilmot the Governor of Nova Scotia, sent the Chief Land Surveyor to make a Survey of that Bay, when upon full enquiry it was found, there were three rivers called St. Croix emptying into that Bay. That the river called by the Savages Copscook, was anciently by the French called St. Croix, and on examining into original Grants of Nova Scotia, It appeared that the Grant made by King Charles 2^d to his Brother the Duke of York in 1663

¹ Page 128 is blank.—EDITOR.

² The text here given of the so-called Morris "Report" agrees with the text as found in the archives of the Maine Historical Society of the documents filed by the British Agent; and, with the exception of slight and unimportant verbal differences, with the copy in the Appendix to the Journal, containing all the papers and documents which have been read and filed with the Secretary by the Agent for his Britannic Majesty and the Agent for the United States of America between the thirtieth day of August 1796 and the twenty-second day of September 1798, in the Department of State at Washington. The footnotes were made by Mr. Chipman and the italicizing of certain passages may also have been done by him, as it is not found in other copies.—EDITOR.

^a M^r Morris is mistaken in this fact; his Father was Surveyor General in the year 1765.

called the Duke of York's Territory, was bounded by the river St. Croix to the Eastward, and by the River Kennebec to the Westward; and on the 12th Aug^t the same year ^a Sir William Alexander obtained a Grant of Nova Scotia, bounded Westerly as far as the river St. Croix, and to the furthest source or spring which first comes from the West to mingle its waters, with those of the river St. Croix, and from thence running towards the North &c. *All the Islands in Passimaquady Bay are included in this Grant, and have ever since been deemed to belong to Nova Scotia.*^b Upon *Governor Wilmot's transmitting to Governor Bernard, the plans and Reports made by the Surveyor of Nova Scotia in 1765, Governor Bernard applied to and obtained a Grant from the Governor of Nova Scotia, of one Hundred Thousand acres including Moose Island, for himself and Associates, Thomas Pownall, John Mitchel, Thomas Thornton, & Richard Jackson between Copscook and Scoodick on the Western side of Passimaquady Bay: *and the remainder of the principal Islands in that Bay, were the same year granted to sundry other Grantees by the Governor of Nova Scotia, and the whole of Passimaquady Bay, together with Grand Manan, and all the Islands in the Bay have been deemed to be within Nova Scotia until the separation of New Brunswick from Nova Scotia.* *130

By the definitive Treaty of Peace signed at Paris 3^d September 1783 The Eastern Limits or Boundaries of the United States are thus described, East by a line to be drawn along the middle of the River St. Croix, from its Mouth in the Bay of Fundy to its source; and from its source North to the Highlands comprehending all Islands within twenty Leagues of any part of the Shores of the United States and lying between lines to be drawn due East, from the Points where the aforesaid boundaries between Nova Scotia on the one part and East Florida on the other part, shall respectively touch the Bay of Fundy and the Atlantic Ocean, *excepting such Islands as now are or heretofore have been within the limits of Nova Scotia.* This makes it clearly evident in my opinion, that Grand Manan, Passamaquoddy Great Island, now called Campo Bello, Deer Island, Moose Island, *and all the Islands lying in that Bay* (whether on the Southern or Northern side of the line drawn *due East from St. Croix) should as formerly belong to Nova Scotia. Whether Scoodick or whether Copscook is the river the Treaty fixes upon for the boundary I will not presume to say, but from the manner in which *those Boundaries are expressed*, I should imagine *that River to be the river St. Croix intended*, whose source should be found *furthest into the Country, westward and Northward towards the Highlands mentioned in the Treaty, being conformable to the Old Grants*; and if my conjecture is well founded, the St. Croix mentioned in the Treaty cannot be properly *131

^a M^r Morris has also mistaken the date of this Grant, it having been made on the 10th of Sept^r 1621.

^b This sentence is copied in the 28th Section of the third part of the argument of the Agent of the United States as follows—"all the Islands in that Bay have ever since been deemed as included in that Grant."

ascertained, until accurate Surveys are made and Commissioners appointed to determine thereupon.

HALIFAX 20th April 1789

CHARLES MORRIS, *S. Gen^t N. S.*

As the Agent of the United States has made this paper Evidence in the Cause, His Majesty's Agent takes leave to observe upon it, in confirmation of the Arguments he has had the Honor to submit to this Honorable Board, that it appears from it,

1st That the river Copscook was in the year 1765 fixed upon as the river St. Croix, by Governor Wilmot and the Surveyor General of Nova Scotia, from a supposition that it was the river St. Croix mentioned in the Patent of the Province of Nova Scotia to Sir William Alexander, and in the Grant to the Duke of York in 1663.

*132 2nd That all the Islands in Passimaquady Bay including Moose Island, and St. Croix now called Dudley Island, have ever since the Grant to Sir William Alexander, been considered as included in that Grant, and as such, *have been deemed to belong to the Province of Nova Scotia, and that these two Islands were accordingly in fact granted to Governor Bernard in the Year 1765, as being included within the Limits of the Province of Nova Scotia, described in the Patent to Sir William Alexander.

3^d That the observations of M^r Morris perfectly accord with and clearly support all the reasonings of His Majesty's Agent upon the present occasion, in considering *that* river as truly intended under the name of the river St. Croix, in the Treaty of Peace, whose source should be found furthest in the Country Westward and Northward, because *that river is conformable to the old Grants made to Sir William Alexander and the Duke of York.*^a

4th That instead of there being no determinate Idea in M^r Morris's mind, (if upon that depended the Idea of the Government of the Province of Nova Scotia at that time) what river was truly intended under the name of the river St. Croix in the Treaty of Peace; he was clearly of opinion with His Majesty's Agent upon the present occasion, that the river intended by the Treaty of Peace under that name, was the River mentioned under the same name in the Grant to Sir William Alexander, because that river formed a part of the Western boundaries of the Province of Nova Scotia, at the time of the Treaty of Peace.

5th That M^r Morris's Judgment has the strongest claim to the fullest reliance upon it, as sound and accurate: as he in these observa-

^a Vide Supplemental Argument, p. 66 in notes.

tions in the year 1789, has clearly pointed out and in a manner predicted the very measures which were concluded upon in the Wisdom of the two Governments, by the Treaty of Amity, Commerce and *Navigation, in 1794, to decide this very doubt, which was the river St. Croix forming a part of the original Western boundaries of the Province of Nova Scotia. *133

WARD CHIPMAN

*Agent for His Britannic Majesty.*¹

¹ The foregoing argument, in the copy in the Department of State, is followed by the certificate: "This Book/ contains a true Copy from the original filed with me. /Att^d Ed Winslow, *Secretary to The Commissioners &c.* /Providence/ Rhode-Island./ 20th October 1798." For comments, see *infra*.—EDITOR.

3

MR. SULLIVAN'S REJOINDER

3. MR. SULLIVAN'S REJOINDER ¹

June 14 1798.

This Book is filed with the Secretary of the Board of Commissioners, that the Agent on the behalf of his Britannic Majesty may have Opportunity to read it. There are other plans to be connected with it by way of appendix and depositions to Accompany the same: These will be filed without any unnecessary delay. Notice of filing

There are some small alterations and corrections to be made, when the maps shall be completed—and Observations as to the source of the River will be added by,

JA^s SULLIVAN

Agent on the behalf of the United States

TABLE OF CONTENTS

Contents of the American Agent's Vol: as a Rejoinder to the Reply of the English Agent.

From page 1 to 24 the title of Sir William Alexander to Nova-Scotia is further considered.

From 24 to 40, the argument of the English Agent on the northwest angle of Nova-Scotia is considered.

From 40 to 59 the Question of the use or propriety of the testimonies of M^r Adams and M^r Jay is considered in answer to the objections made by His Majesty's Agent.

Page 59, contains the proposal for an argument thus arranged.

From 60 to 122 the testimonies of Witnesses, Acts of Government, Charters, Grants, Claims &c, are considered on the question of what was contemplated as the River S^t Croix anno 1703, when Nova-Scotia ceased to be a part of Massachusetts.

From 122 to 142, blank.

From 142 to 234, the question is examined:

Whether the evidence offered by the English Agent is sufficient to prove that the river called the Scoudiac was originally by De Monts in the year 1604, called The Saint-Croix.

From 234 to 280, the question is considered:

Whether the Scoudiac was in ancient treaties, Charters &c, contemplated by the name of Saint Croix.

From 280 to 480, the Question is examined:

¹ In the official copy in the Department of State there is a leaf on which is inscribed the title: "The American Agent's Rejoinder to the Reply of the Agent for His Britannic Majesty." The original paging is preserved on the side, for reference. The secretary of the commission, in a footnote, states that, in the numbering of the pages of the original, there were several errors which he had not corrected in the copies, because in the arguments and proceedings the references were made to the original paging.—EDITOR.

Whether if all the ancient charters, grants, treaties, and histories contemplated the Scoudiac by the name of the S^t Croix it will from thence follow on the evidence before the Board that the same river was intended in the treaty of peace by that name.

Under this head the evidence offered by each party is considered. From 480 to 522, the question of the exercise of jurisdiction is considered, and in this the right vested in the late province of Massachusetts Bay by the Charter of 1691 is attended to.

From 522 to the end the Question of what shall be considered as the source of the river is attended to.

To the Honorable the Board of Commissioners, appointed agreeably to the fifth article of the Treaty of Amity, Commerce &c between his Britannic Majesty and the United States of America:

The undersigned, Agent of the United States, having considered the claim of his said Majesty, to the river Scoudiac, as the river S^t.

Accumulation of
historical facts

Croix mentioned in the Treaty of 1783, and so a part of the boundary of the United States in that Treaty described; and having filed before your honorable

board, his memorial on the behalf of the United States, claiming the river called by the native Indians, the Magaquadavic, as a part of the boundary given in that Treaty; and having attended to the reply made on his said Majesty's behalf to that Memorial, now has the honor to subjoin such observations as he considers to be necessary on the occasion.

- 2 The Agent of the United States gratefully recognizes the patience of this Honorable Board, and most cheerfully apologises for anything which may have been unnecessarily said by him tending to render troublesome a cause, naturally burthened with circumstances of weight and importance.

There is indeed an accumulation of historical facts in the case, which were in the origin of the business as unexpected to the Agent of the United States as to the Commissioners. But the Agent for his Majesty, having founded the claim of his sovereign, in a Grant made by his Royal Predecessor to Sir William Alexander, it was not known, whether that claim would be urged, upon the same principles of private right, or whether the present Province of Nova-Scotia, should be considered, as now claimed by the Crown, as publick property only. The former might be most reasonably expected, because that otherwise, a display of the Patent to Sir William

- 3 Alexander could not be necessary. The Agent for the United States considers it as proper to attend to such arrangements in this arduous business, as will distinctly call up before the honorable board such points as the Controversy in fact rests upon, and to separate and di-

gest the proofs which apply to each, so that all may be rendered intelligible, be preserved from confusion, and have their reasonable and natural force.

He does not conceive, that any advantage will result to the Justice of the cause, by his changing the arrangement which he adopted in forming his reply to the claim made for his Britannic Majesty. He will therefore in this rejoinder to the reply of his Majesty's Agent continue to consider—

Adherence to
original order
of topics

First, That at the time of the Treaty of Peace now under consideration, his Britannic Majesty had no Province, holden under, or founded in a grant from King James to Sir William Alexander.

Secondly, That the whole territory now in controversy, was in the year 1691, granted by King William and Queen Mary to the late province of Massachusetts Bay; and that no formal conveyance, or release, or any act of partition, or division, had been made thereof, before the said Treaty of Peace.

Thirdly, That the Scoudiac is not the river S^t Croix “truly intended under the name of the river S^t Croix as mentioned in the said Treaty of Peace, and forming a part of the boundary therein described,” but that the river called by the native Indians, the Magaquadavie is the river, so truly meant and intended. 4

In this rejoinder the Agent of the United States will submit the evidence on which his facts rest, and the deductions from the same, with that diffident respect which becomes him, when he is before this important Tribunal.

And however confident he may be in the justice of his cause, or in his being fully possessed of it, in all its parts, yet he will cautiously avoid bold assertions, and positive averments of the truth of facts, or of the correctness of his own conclusions. Truth can never depend on strong asseverations or upon positive assertions. Truth is a simple natural principle, which is supported by its own appearance, and can never be annihilated.

In the first part proposed in the arrangement of these observations, we are to consider, whether at the time of making the Treaty of Peace now under discussion, his Britannic Majesty, or any other person held the province of Nova-Scotia, under a grant of King James to Sir William Alexander.

Nova Scotia
public property
in 1783

The whole of the Argument of the agent of the United States upon this point is calculated to prove that whatever grants might have been made in Ancient times, of a tract of territory by the Appellation of Nova Scotia in America, yet, that when the Treaty of Peace was 5

made in 1783, the whole of that province was in the King of England, not as private, but as the Public property of the Nation; and that therefore, any grant to Sir William Alexander could have no effect in the controversy, any further than as the same might, like any other ancient document, serve as a circumstance in the evidence on the question, which is the river truly intended in the Treaty of Peace, as a part of the boundary between what is now the province of New Brunswick and the United States.

As on this point, the facts stated and the deductions made from the various statements submitted by the Agent for his Majesty are all produced in corroboration of the position of the Agent for the United States, it would be a misspence of time, to enter into a minute discussion of them.

- 6 The Agent for the United States begs leave to call the attention of the board, to a general review of his statement on this point; and that a similar attention may be then given to the reply of his Majesty's Agent. When this is done it will unquestionably be observed, that there is no essential difference in the Statements, and that both conclude to the same point.

It is clearly seen, that in this Statement the Agent for the United States had it as a principal object to prove, that notwithstanding the patent of King James to Sir Will^m Alexander in 1621, such proceedings, cessions, conveyances and relinquishments, had been made, that no person now is in the possession of one acre of that vast territory, under or by force of that grant, but that the territory which is now the Provinces of Nova-Scotia and New Brunswick has been long merged, in the right of the Crown as public property, and has long been and yet is treated as such.

To prove this he exhibits the Deed of Alexander to Claude La Tour in 1630. He proves that La Tour was considered here as a French subject. That by the Treaty of S^t Germain in 1632, the whole country included in that Patent with a large territory besides, was ceded by the British to the French Crown. That the French King paid no regard to La Tour's Title under the Grant of James to Alexander, or the conveyance of Alexander to La Tour; but the whole country
7 ceded by that Treaty was granted to the Quebec Company, and by that Corporation parcelled out to individuals. That when the same Country was reduced by Oliver Cromwell in 1654, he granted a part of the same to Temple, Crowne and the son of Claude La Tour.

That after the restoration of Charles the Second, in the year 1667 the whole was again ceded to France. That in the year 1690 it was again reduced to the Subjection of Great Britain. .

That in 1697 it was ceded by the Treaty of Ryswick to the French, but vested again in the English Crown by the Treaty of Utrecht, 1713, and from that time held as Crown Lands, and granted and disposed of as such.

But an exception is called up in regard to the Charter of Massachusetts in 1691 which is to be considered. The interruptions, changes or restrictions attached to that Charter, will be attended to as may be necessary in another place. The Agent for the United States will now proceed to shew that his Statement made upon the foregoing point, is not materially contradicted by anything that has been advanced by the Agent for his Majesty.

The Agent for his Majesty in his second part, page 15,¹ has attempted to shew that the Deed from Alexander to La Tour did not contain all the land which had been granted by the Patent of King James to Sir William Alexander. This may be Deed of Alexander to La Tour 8
or may not be the fact,^a and let the fact be which way it may, it cannot be material in the question before us. Douglass, Hutchinson and other Historians took it for granted that the whole had been conveyed. The bounds of the Deed, it is, and has been confessed are not in the same words as those used in the Patent of James for a description; but this matter if it was important, could soon be settled by the Agent of His Majesty in a satisfactory manner.

When Charles the Second came into the actual possession of the British Throne, one would have expected to have seen Lord Stirling, the friend and confidant of his family, restored to a Province that had been ceded to the French, no more Charter to Duke of York
than Eighteen years before that time but which had by the exertions of the Republic been reduced to its former English subjection. When the King invested his Brother with a Territory, for a Province, adjoining to what had been the Province of Nova-Scotia, we could not have expected to have seen a family so friendly, so important, so faithful, and yet so poor as the Stirling family neglected.

When Charles in 1667, ceded what had been Nova Scotia with a part of what he had granted to his Brother the Duke, we hear no claim of Stirling's heir upon the subject of a Royal compensation. When Cromwell had granted a tract Grant by Cromwell 9
of Country within the Charter of James to Alexander,

¹ Supra, 298.

^a The Board has compared that with the Maps. It is not certain that its particular description includes all the peninsula of Nova-Scotia, but it's general appellation does: goes east to Fort Osmeron on the St John, and west on the mainland, north of the Bay of Fundy to Pantagoet or Penobscot river.

but not within the Deed of Alexander to La Tour, as the same is construed by the Agent for His Majesty, pages 15 and 16;¹ and when the same was confirmed by Charles the Second, we do not hear the heir of Lord Stirling complain of any injury done to his patrimony. It is said by the Agent of His Britannic Majesty, page 18,² that it would have been a very extraordinary circumstance that Lord Stirling after having been at such vast expence, should grant away the whole of his province.³ But is it not as extraordinary a circumstance, that if he had not done it his claim should remain in his family, silent from that day to this, notwithstanding the great expence he had been at, and the rising value of the Country? The Grant of Cromwell it is to be noticed, was of Lands as far West as Penobscot, and a grant of which could never be construed to be a confirmation of the Patent of Alexander. This position is recognized by the Agent for His Majesty who says Page 21:³ "If however this is a correct statement it is not easy to account for this son of La Tour, having made out a title to the whole Country, as far Westward as the River Saint George, under Sir William Alexander."

Page 22:⁴ "It must be acknowledged that there is a Mystery in the different accounts of La Tour's interest in this Country, not easily to be explained by any documents handed down to us."

- 10 In the 22nd page of the reply upon this point, we are called to attend to the Statement made by Beawes the author of the *Lex Mercatoria*, upon his title to the land under Stirling's Claim.

Claims of Beawes
and Waldo

However correct that writer may be where his own Interest is in question, yet he is but a wretched blunderer in his attempt to describe this Country in general.

There may be very great doubts whether Beawes and Waldo ever had a conveyance of any part of the Country which had been known by the name of Nova Scotia. There is no such Deed produced.

It appears by documents on the Table that the Council for the affairs of New England in the year 1631 granted to Beauchamp and Leverett a tract of Country on both sides of Penobscot River—

Commonly called and known by the Name of Muscongus towards the South or Southwest and a Strait line extending from thence directly ten leagues up into the mainland and continent, there towards the South Sea and the utmost limits of the space of

¹ Supra, 298.

² Supra, 299.

³ Hutchinson says, Vol. 1, p. 28, that Alexander in 1631, "had sold the country of Nova-Scotia to the French." He does not say that it was the sale of a part only.

Douglass, Vol. 1, p. 306, says "Sir William Alexander sold the property of Nova-Scotia to M. Claude de la Tour D'Aunay, a French Protestant."

⁴ Supra, 301.

⁵ Supra, 302.

⁶ Supra, 302.

ten leagues on the North and North East of a River in New England called Penobscot, towards the North and North East, and the great sea called the Western ocean towards the East and a strait and direct line extending from the most Western part or point which extends from Muscongus aforesaid towards the sea to the utmost Northern limits of ten leagues on the North side of the said River Penobscot.¹

A part of this tract was included within a Territory granted by Cromwell to Temple and others. Temple lived within it when Charles the second removed him by a cession in favor of the French Crown in 1667.

General Waldo purchased a part of the Patent of Beauchamp and Leverett, and soon after went to England in order to defend it against the claim of the Crown. He may have purchased a release as to all claims under the grant of Charles in 1662, to Sir Thomas Temple of Lands on the East of Penobscot, and within the Patent of Beauchamp and Leverett on an idea of that patent's extending on both sides of the River. 11

This appears to have been the case, from this circumstance, related by Beawes, as cited in the reply "and as we were conscious of what importance the settlement of this province would be to the Northern Colonies, we secured a number of Swiss Protestants to begin it," &c.

The Swiss and Germans, brought over by Waldo, were settled on the West side of, and more than twenty miles distant from Penobscot river.^a They would by no means be within the grant to Temple, but were within the Muscongus claim, a part of which on the East side of the River might have been within the Grant of Cromwell to Temple and others.

Temple in his remonstrance, as mentioned in reply page 23,² describes a Country of two Provinces, under the general name of Nova Scotia, but particularly called Alexandria, and Caledonia, established and confirmed by Acts of Parliament, but no notice is taken of this remonstrance; Temple's claim
and remonstrance nor any such Acts produced.^b

There was another petition of Sir Thomas Temple in 1667 setting forth as in page 25³ of the reply, that he had purchased of Charles La Tour, the inheritance of Nova Scotia, and part of the Country called Accadie &c.

¹ See Hazard, I, p. 304; Farnham Papers, I, p. 125.—EDITOR.

^a Gen. Knox's deposition.

² Supra, 302.

^b But even this is a concession that the Grant of 1621 was void, for the title is not founded in that but in Acts of Parliament.

³ Supra, 303-4.

- 12 Now it cannot but be observed, that he could not have purchased the inheritance of Nova Scotia of La Tour, unless La Tour had power to sell it, and that he had not this power as derived from the Patent from James to Alexander, unless the Deed of 1630 from the latter conveyed the whole of the Patent to him. Temple further says that La Tour came into England in the year 1654 and made out his right to the Country, and it was restored to him (reply page 26).¹ He certainly could not make out a title unless he had one, and if he had it Alexander's heirs had none.

According to the account given by Beawes, this Petition was laid by and neglected from 1697 to 1763, the space of sixty-six years.

The Agent for the United States is so deeply impressed with the sense of the National dignity of his constituents that he is obliged to refrain from every thing which would make him appear as engaged in a personal controversy.

He therefore avoids that mode of argument, which in other places is too frequently used, but he wishes to be indulged in one remark on some passages in the reply to this point which are contained in page 28.²

- 13 The Agent, in the first section, exults in the proof produced, that Alexander's Patent was never abandoned, but [was] claimed under, quite down to the year 1763; and yet in the next section he concedes that doubtless there must have been some defect in the derivation from Alexander to La Tour, or for want of a proper conveyance from La Tour of the title conveyed to him by Alexander.

The Agent for the United States takes this to be the language of the Conclusion: That Alexander sold a small strip of his patent to La Tour; that the heirs of Alexander have never since made any claims or effort on the Title; that La Tour sold it to Temple, who a century ago made a claim which was never acted upon by the Ministry; that Temple's heir sold whatever right he imagined to be his to Waldo, who sold one half of it to Beawes, neither of which have ever been in possession or have been attended to as Proprietors worthy of notice, and that therefore the claim under the Patent to Sir William Alexander has never been abandoned.

The Agent for His Majesty further states in Page 28³ of the reply that, "Aglate La Tour, grand daughter of the beforementioned La Tour, by management and small considerations, procured quit claims from all the heirs and assigns of La Tour. She married a Subaltern Officer in Phillips's Regiment. She went to England and sold the

¹ Supra, 304.

² Supra, 305.

³ Supra, 305.

Seigneurie or property of all the province to the Crown of Great Britain, Anno 1731, for Two Thousand Guineas." ^a

The object of the Agent for his Majesty, appears to be in Page 30,¹ to prove, that the Grant of the Charter to Sir William Alexander, was in force in 1691, in order to prevent the operation of the Charter of that date to Massachusetts, but how far that fact would avail his Government, if supported, will be considered under the next head. At present it is enough to ask,

First. If Sir William did not convey the whole of his Patent to La Tour in 1630, and from that time abandon it, why has there not been a claim or possession since that time under his title by his heirs?

The claim of Temple was under La Tour, and the Crown in 1730 acknowledged La Tour's right to all by purchasing it of Aglate, his ¹⁴ grand-daughter, as is supposed on the other side. But in fact this was a purchase of her right to her Father's or Grand-father's Estate, granted by Charles the second in 1662, which as the Agent for the United States conceives, had no connection with Alexander's Patent.

There are several positions in the reply quite heterogeneous and irreconcilable, as—

First. If La Tour did not purchase the whole of Nova Scotia of Alexander, and yet holds a part, why do not Alexander's heirs claim the residue?

Secondly. If he purchased the whole and sold it to Temple, and

^a Governor Hutchinson mentions a Frenchman by the name of D'Entremont who lived in Boston, who was a descendant of La Tour, and was removed from the Eastward in 1756: from whom Governor Pownall received the account of various French Grants made on the main Continent between St. Johns and Penobscot, after the Treaty of Ryswick and before the Treaty of Utrecht and gives this Account from him in a marginal note page 127-133 &c. D'Aulney died in 1652 and La Tour married his widow, "and in 1691 a daughter of D'Aulney and a canoness of St Omer's dying, made her brothers and sisters La Tours her general Legatees.

"Under them, and by force of divers confirmations of former grants made by Lewis the 14th, between the peace of Ryswick and that of Utrecht, D'Entremont aforementioned claimed a great part of the Province of Nova Scotia and of the country of Acadie. Of part of those in Nova Scotia he was possessed, when all the French inhabitants were removed by order" &c.

This piece of history found in Hutchinson shews clearly that no regard was paid to the obsolete charter of King James to Sir William Alexander, and that it was not in those times thought of.

The story of Aglate La Tour is accounted for by the circumstance that the families of D'Aulney and La Tour became incorporated, and the daughter of the former having devised her paternal inheritance to the children of her mother by the said marriage, La Tour's children by her will, became the proprietors of what had been the Estate of D'Aulney, viz., of a tract from the middle of the Bay of Fundy West to Penobscot River and twenty leagues deep from the sea.

Douglass says, Vol. 1, p. 383. "Upon the peace of Utrecht 1713, Nova-Scotia and Sagadahoc were quit-claimed by France to Great Britain."

¹ Supra, 306.

Temple to Waldo, and Waldo to Beawes and they are the Proprietors, why should the Government of Nova Scotia make the grants which are mentioned in the general introductory part of the reply page 108¹ &c, of the Island of Campo Bello, of Deer Island, Ten Thousand Acres to Gorham, ten thousand acres more to the same; the grants to Oldham, James Boyd, William Owen, Edward Crosby, Thomas Farrell, 100,000 Acres to Bernard, all including an immense tract of Country, and made before the year 1774, [and] an immeasurable
 15 quantity of territory since that date.

The heirs or assigns of Alexander who are yet alive, do not appear to have been consulted in those, nor in the grants not mentioned of
 Millions of Acres in trust for the Loyalists. How
 Grants to Loyalists vain is it then to halt with a confessedly imperfect and obsolete title in a cause of this consequence.

The Agent for the United States has the honor to give his ideas upon this matter on a full and mature investigation of the subject:

That after the deed to La Tour from Sir William Alexander, [neither] he nor his heirs ever claimed any part of the Country. That upon the Treaty of Saint Germain's, the whole ap-
 Summary of Contentions peared to be merged in the Crown right of France.

That after the conquest by Cromwell in 1654, La Tour, who was no doubt, as he is represented to be by the Agent for His Majesty, a protestant, or a catholic, a Monarchyman, or a republican, as suited his private concerns, obtained a new grant in company with Crown and Temple as exhibited by the Agent for the United States of a part of the Country extending to the river Penobscot; that this was received by him as a compensation for the loss of all which his Ancestor had acquired in the Deed from Alexander. That he entered into long and sharp contentions with D'Aulney, who claimed under the French Crown as mentioned in the Statement of the Agent for the United States. That he made various conveyances to divers persons, but the end of the whole was, as is supposed by the Agent for His Majesty that a pretended or perhaps a real descendant, released to the English Crown her right to all the land, granted by Cromwell and confirmed by Charles as well as those granted by the French Crown, and that so the King in his Corporate capacity was seized of all the Country, the grants or patents of his ancestors notwithstanding.^a

16 This is the position which the Agent for the United States made

¹ Supra, 238.

^a The release of La Tour's family was probably of a Tract granted to him in 1635, by the King of France which is on the River Saint Johns where he lived. This grant is in the memoirs of Commissioners at Paris in 1754.

upon this head, and this he conceives has been fully maintained and supported, that in the year 1783 His Britannic Majesty had no province in America by the name of Nova Scotia, held under or founded in a grant from King James to Sir William Alexander in the year 1621.

There can be no necessity for entering into a minute discussion of the principles advanced by the Agent for His Majesty, from page 36 to 45¹ in this part of the reply, and upon the operations of the principles of the Feudal System. A trial of skill in a controversy of this magnitude, would be unbecoming to both sides; all that can be said has been already suggested:

Discussion of
feudal principles
unnecessary

That if Alexander did not sell his whole Estate to La Tour, his claim to the residue became derelict; and we have nothing offered in favor of any part of it unless of that part which had been sold to La Tour.

That the claim of La Tour and others under him, appears to be founded in the Acts of 1656 and 1662 rather than in a patent of 1621.

That the Patent of 1621 to Alexander must appear under all circumstances to have been cast into the general wreck of Charters, which took place under the reign of Charles the first.^a

It is not contended however that this Patent can have no use in this trial, for the Agent for the United States sees the necessity of attending to it as a piece of evidence in the question before the Board.

True position of
Alexander Grant
in the controversy

From it as is said by the Agent for His Majesty light may be thrown upon the issue.

The Agent for His Majesty has suggested in his reply, and with good foundation, that the Agent for the United States entered into the discussion contained in the first head of his argument in order to prove that the Crown of England in 1691 was seized as of public property of the Territory which is now the Provinces of Nova Scotia and New Brunswick. And the Agent for the United States again inquires what has been offered to contradict the position?

After the conquest in 1690, did the heirs of Alexander make any claim? Temple claimed, but evidently under another grant. Where is the one now holden within the bounds of Nova Scotia under a grant from Stirling or La Tour? Should it be said on the other side that *Aglate*, daughter of La Tour, sold to the Crown of England in

¹ *Supra*, 309-14.

^a The yielding his Charter of Nova-Scotia in 1630 to a French subject, and the cession of it by the King of England to the French Crown in 1632, gave him a claim for another province in 1635, but the grant of territory then expected was not of any part of Nova-Scotia.

1730 her right, where are the Deeds and procurations spoken of by Douglass, from the other heirs to her? Where is the evidence that she ever made a Deed to the King? And where is it recited in the Instructions of the King to the Governour of Nova Scotia that he shall grant land reconveyed by the Assignees of Alexander?^a

If La Tour had but a part, why does His Majesty, if he claims under a grant from the grand-daughter of La Tour of a part only, convey the whole without the consent of his co-tenants who are entitled to a part; and why does he, if he claims only under the grant of a narrow strip
18 from Alexander to La Tour, on the Peninsula of Nova Scotia, grant immense tracts in New Brunswick clearly within the Patent to Alexander?

But leaving these question with their natural and uncontrollable effects the Agent of the United States will offer a few words upon the

Charter of Massachusetts Bay, 1691
reply of His Majesty's Agent, in regard to the position, that by the Charter of William and Mary in

1691 the whole of the Country from the river Sagadahock or Kenebeck to the river and Gulph of St. Lawrence was granted to the late Province of Massachusetts Bay.

The Agent for His Majesty in his reply from page 46 to 47,¹ seems to be attempting to shew, that the King had no right to make a Charter extending over what is now the Province of Nova Scotia and New Brunswick, and this he concludes from these facts which he asserts to be fully proved:

That the right to the soil was then in Sir Will^m Alexander, and that the Jurisdiction only was given to the Massachusetts.

That the Jurisdiction was dissolved by the Treaty of Ryswick.

That on the recession of the Country at the Treaty of Utrecht, a new Government was established by the Crown, over Nova Scotia under its original boundaries which continued to 1783.

The first proposition is already attended to, but it may be necessary to turn the attention of the Honorable Board to a decision made
Opinion of Talbot and Yorke
in the Year 1731 by the late Lord Talbot, the then Solicitor General, and Sir Philip Yorke, the then Attorney General, upon this very question, upon which

19 they say, "That the tract not having been yielded by any Treaty, the conquest thereof by the French, created only a suspension of the property of the former owner and not an extinguishment, and that upon the reconquest of it by General Nicholson in 1710, all the ancient

^a If the Crown was not seized in 1691 but made a grant at that time to the Province of Massachusetts Bay, and after that grant purchased of the Tenant of the Freehold the purchase must ensue to the former grantee of the Crown.

¹ Supra, 315-16.

rights both of the Province, meaning the Province of Massachusetts Bay, and private persons subjects of the Crown of Great Britain did revive and were restored, *jure postliminii*."

If this was the Law, we cannot but suppose with those great men that all the rights which the Province had possessed were revived by the Treaty of Utrecht.

There is a distinction made by these learned Gentlemen, that where a Country is ceded by Treaty, and not taken by Conquest, the rights of individuals upon a recession do not return *jure postliminii*.

Whether the Conquest of 1690 had been complete, the Board will Judge when it shall be recollected that Sir Thomas Temple an English Subject remained in possession after the Treaty of Ryswick for several years, and that from the year 1690 to 1697 the British Government had Garrisons at Annapolis, Mount Desert and other places, and that the authority of the French Government was entirely subverted.

But this new kind of argument that a party granting shall avail himself of a want of power to make the grant cannot demand more attention.

The other objection is to the nature of the property granted.

The Governour and Assembly by that Charter had a right to grant 20 all the lands within what had been the Colonies of Massachusetts and Plymouth and the Province of Maine without the possibility of a restriction. But as to the Territory between Kenebeck and the river and Gulph of S^t Lawrence no grant was to be valid unless the Crown should ratify it.

Nature of property granted

There was also a saving of all private property. This was done to secure the right of Gorges' heirs and Assigns, of that of the proprietors of the Plymouth Patent, of the Medunkook Patent, Beauchamp and Leverett's, and a great many others including vast tracts held under Indian Deeds. The property was indeed in an extraordinary situation. It could not be granted by the Crown without the Province, or by the Province without the Crown.

That the Province had a qualified property in the soil, will follow of course.^a

^a This saving can in no sense as is supposed by His Majesty's Agent be a reservation of Alexander's right either to his heir or to any one holding under him. From all the statements by him made it appears that Alexander's right had been merged in that of the Crown. If the King intended to reserve his own right to any part of the lands, it must have been specially defined. The whole country was his, the Charter of Gorges to the province of Maine had been surrendered. Those of Massachusetts and Plymouth had been vacated, so that the Grantor had the right to one part of the territory as to the other. Again: The title of the Duke of York's patent is as much within the reservation as Nova-Scotia is, and yet the Crown has never contended, nor has it ever been agreed that the territory between Sagadahoc and S^t Croix (the whole of the Duke's patent) is within the reservations of the Charter.

The manner in which the Province of Massachusetts Bay relinquished its right to a part of this territory has been fully stated by the Agent of the United States, in his Argument on this head. The Statement by him made is not contradicted by the Agent for His Majesty, but that Agent has endeavored to connect it with three other events which are all foreign to it.

The relinquishment of Massachusetts was in the Year 1703, seven years before the Conquest by Nicholson and ten years before the Treaty of Utrecht, and twenty nine years before a Commission was made out to Phillips to govern Nova Scotia. So that in fact it was abandoned by the English Crown, not as a Government, but as a Wilderness in which there was no Government, for a great number of years after it was abandoned by Massachusetts. Indeed it remained without a civil government from 1703 to 1732 as appears by the statement on both sides.^a

- 21 But, before there is a close of this part of the argument, we ought to enquire, under the proper and legal ideas of the process of Inquest of Office which have been so copiously served upon the question of Sir William Alexander losing his estate, how the King could consider the right of Massachusetts to Nova Scotia as vacated even tho' it was a right to Jurisdiction only, without office found? Or when the King by the Treaty of Utrecht had become possessed of the land granted to Sir William Alexander, how could he without the consent of the Grantee's heirs establish Royal government where there had been an hereditary governmental right, established by Charter? Or how could he empower Governour Phillips to grant Territory which had been granted to the Earl of Stirling and of which no Office had been found?

If the Charter of Alexander has never been abandoned, never became derelict, has never been conveyed by him, or his heirs, or has never been lost by Treaties and Conquest, His Britannic Majesty has but little interest in this controversy as to the property of the soil; for the heirs

- 22 of Lord Stirling are now within the United States and by the Treaty of Amity, Commerce and Navigation from which this honorable board has received its existence are restored to their estate. They were British subjects until the American Revolution, and as Citizens of America are now entitled to the benefits and advantages of the Treaty.

^a The Commission to Phillips is dated in 1717, but it is clear that he was merely a nominal Governor. For this see Douglass, Vol. 1, pp. 328, 330. [See Gallatin, Northeastern Boundary Arbitration, App. No. 15, pp. 125-7.—EDITOR.]

Several Pages, in the residue of this part of the British Agent's reply, being but a recital of what was offered by the agent for the United States with some other facts, which, as he concedes, are quite foreign to the question before the Board, there can be no necessity for a particular reply to them.

There are other observations in this part of his reply, which are connected with the next question, whether the Scoodiac or the Magaquadavie is the river truly intended in the Treaty of 1783 as a part of the boundary therein described. These observations will therefore remain unnoticed under this head.

Having gone through a wide field of historical facts, and made a variety of observations which perhaps derive their importance only from the feelings of the advocate, the parties appear to be found upon this ground:

Restatement of
contentions on
both sides

That all North America was claimed by England and France in force of the *pious* and *humane* right of discovery. That the French Nation had the prior possession, but not the prior discovery of the Northern part of the Continent; that De Monts under a French Commission took possession of it in 1604, that the French people were attacked on the Eastern shores by the Governour of Virginia in 1613. That King James granted a Province called Caledonia, or Nova Scotia, to Sir William Alexander in the year 1621. That the Patent was confirmed by King Charles in 1625; that Sir William sold the whole or a part to La Tour in 1630. That all was ceded to France in 1632. That it was all granted away by the French Crown to French subjects, before it was reconquered by Cromwell in 1654; that he granted a part of it to La Tour's son and two others in 1656; that King Charles confirmed that grant in 1662, and in direct opposition to it granted what he confirmed to Temple and others to the Duke of York, and then ceded the whole to the French Crown in 1667; that in 1690 the Fortresses there were conquered by Phips. [That] in 1691 the whole was granted by the Crown under certain restrictions to the Province of Massachusetts Bay. That in 1697 the whole, all Acadie and Nova Scotia, which clearly comprehends the whole Country, [was] ceded to the Crown of France by the Treaty of Ryswick; that in the year 1703 the Ministry construed the Treaty to cede the Country no further West than to the river Saint Croix; that Massachusetts appeared contented with that boundary being the extent of the Duke of York's Government. That by the Treaty of Utrecht all the Country was ceded to Great Britain; that Great Britain in 1732 attempted a Government there, but had none of any efficacy, until the Earl of Halifax's administration in 1749; that no

- 24 person as a descendant from Alexander has claimed any right to soil or government there for the space of 167 years; that the King has established two governments and continues to grant the soil under an idea that the Patent of Alexander is derelict and void, without any other process than the result of Treaties, Conquests &c.^a That in the year 1783 His Britannic Majesty acknowledged the Province of Massachusetts Bay and the States confederated with it in the then war, free, foreign¹ and Independent States; and in order to avoid all controversy on the subject of boundaries, certain boundaries were delineated in the second article of the Treaty then made, in which it is declared that the bounds should begin, "from the North-west Angle of Nova Scotia, viz. that angle which is formed by a line drawn due north from the source of the S^t Croix River to the highlands."

This angle being unknown, and the river from the source of which it is to be formed by a due north line being not ascertained, the two nations have agreed upon a mode of investigation in order to determine which river was truly meant and intended in the Treaty of 1783, as the one from the source of which this angle by a due North line is to be formed.

- The next question, and in fact the real question in the case is where shall we find that North-West Angle of Nova Scotia, which was supposed in the Treaty of 1783, to be formed by a line drawn due North from the source of the river S^t Croix.
- 25 Northwest angle of Nova Scotia the real question

This is a question which the two Nations have considered as demanding the most dispassionate, disinterested, and assiduous investigation.

It is then to no purpose for the Agent on the one side or on the other, to interpose confident assertions as to his proofs, or bold averments as to his deductions. This question must be stript of all the trappings of art, must be disrobed of the dress which eloquence and

^a In Vattel, p. 587, we find this principle. "When a Nation, People, or State has been entirely Subdued, it is asked whether a revolution can entitle it to the right of postliminium. In order justly to answer this question there must be again a distinction of cases. If this subdued state has not acquiesced in its subjection; has not voluntarily submitted and has only ceased to resist from inability. If its Victor has not laid aside the sword of conquest nor taken up the sceptre of peace and equity such a people are not really subdued. Many doubtless return to their former state." Can any one say that after the Treaty of S^t Germain in 1632 of Breda in 1667 Lord Stirling or his heirs, if he had not sold his estate had such a right remaining, as that the Law of postliminii could in the conquest of 1690 have revested the Estate in him or them? The English monarch was the head of the State and ceded it away. The French Subjects who were in possession in 1690 became English subjects, and as such held their Lands.

¹ It is so in the official copy, but "foreign" evidently is a copyist's error for "sovereign," which is the word in the treaty.—EDITOR.

ingenuity on the other side have wrapt it in, and be reduced to its simple natural appearance. The pomp of expression, such as the ancient Province of Nova Scotia, North West angle of an ancient Province, the Saint Croix of De Monts in 1604, of King James in 1621, of L'Escarbot, Champlain, and of Alexander, of the Parliament of 1774 and of the Treaty of 1783, with all declarations of full proof, convincing evidence, undeniable conclusions, logical deductions, full persuasions, and irresistible convictions may be laid aside whilst we state and analyze the question, fix upon the principles which will govern the investigation of it in its several parts, and examine and apply the evidence to each.

This will assist in an ultimate decision of the cause, on its genuine and proper principles.

Numerous repetitions of a supposed fact, by either side, cannot 26 afford any degree of evidence on the issue, where there is none produced; nor do repeated averments that evidence exists, which is not seen, or that facts are proved by circumstances which have no relation in nature with them, furnish proofs or conclusions.

The Agent for the United States does by no means find it to be his duty to follow the Agent of His Britannic Majesty, from page to page in his reply, or to make assertions, and averments, in opposition to those contained in his statement; but will state the question, which this point offers to the hon'ble Board, and consider as far as he is able to do it, the facts offered by this Agent for his Majesty; and as he proceeds will offer such evidence on the part of the United States as the nature of the controversy affords, and leave the conclusions, and deductions, before that Tribunal where the Treaty of 1794 has placed them.

In this question, we find it to be important, to discover where the North-West Angle of Nova Scotia contemplated in the Treaty of 1783 is to be found.

It is in that Treaty described in these words, "that Angle, which is formed by a line drawn due North from the source of the River S^t Croix to the highlands." In Geometry an Angle is the point of intersection on the mutual inclination of two lines, and therefore to give a second line the Treaty adds, "along the said high-lands which divide those rivers that empty 27 themselves into the River S^t Lawrence, from those that fall into the Atlantic Ocean." But still a course to exhibit the inclination of this second line was necessary and it was therefore added, "to the North-westernmost head of Connecticut River." Then the Treaty contemplates a line running on the high-lands, so as to divide the rivers

Description in the
Treaty of 1783

which run into the Saint Lawrence, from those which fall into the Atlantic Ocean, but whether this is to be a direct or a crooked line is not ascertained in the Treaty. If it divides those rivers as above expressed, there can be no pretence of its being a strait line. It is either in its general inclination, or in its direct course, to run to the Northwesternmost head of Connecticut River. But who can determine the course of such a line? Who has explored and determined the Northwesternmost head of Connecticut River? Where is the man who has stood on the East end of the High-lands above-mentioned and from the Bank of the Saint Lawrence, has pointed the eye to the Northwesternmost source of the Connecticut? There can be no angle existing as known to any man, until those lines are formed, for the point of their inclination is but a mathematical deduction from a perfect recognition of the lines themselves. And yet the Agent for His Majesty speaks of this Angle as if it was as familiar to the public eye as the Tower of London, or the Pike of Teneriffe.

Perhaps it may be useful in the process of this business to examine the origin of this line. If it is found to originate in the Treaty of 1783, all the learning expended on its supposed antiquity will vanish as a mere dream; if it appears never to have been imagined until the effecting of that Treaty, and then to have been without definition of Longitude or Latitude, without marks or signs, it will be a very different thing from what has been spoken of by His Majesty's Agent.

It was found at a very early period that the rivers flowed from the Southward into the river Saint Lawrence, and from the Northward into the Atlantic Sea. This raised a reasonable conjecture that there was a ridge of high-lands which divided those rivers from each other. But the Savage State of the Country, the continued wars of the Nations and of the Indians, and the immense labour of traversing such an extensive wilderness, raised obstacles too great to be overcome by the prospect of any advantages, which would possibly be the result. Indeed we are as entire strangers to these high-lands and the sources of the rivers on either side of them as we are to the sources of the Nile.

In the grant of King James to Sir William Alexander, the high-lands do not appear to be mentioned, the words are: "unde per imaginariam directam lineam quæ pergere per terram, seu currere versus septentrionem concipietur ad proximam navium stationem, fluvium vel scaturiginem in magno fluvio de Canada sese exonerantem."

The high-lands are here made no part of the boundary; but the line,

as an imaginary line, was to be drawn *towards* the North, or Northerly to the source or spring of a river, which emptied its waters into the river Canada. The last mentioned river then is described, as the boundary on the North-East of the Patent.

If the Agent for the United States is right in this position, it will be inquired of the Agent for His Majesty, where he finds evidence to support assertions, that the Angle now contended for was formed or known, or even imagined in the patent of King James to Sir William Alexander? From whence he draws support for his assertions, that the line contemplated by the Commissioners in the Treaty of 1783 is a line described in that Patent? The line of the Treaty is a line due North in its course, and in its extent reaching from the source of the Saint Croix to the high-lands. The line in Alexander's Patent is an indefinite, uncertain line, which is to leave not the source but the most western spring of the Saint Croix and wander to the unexplored spring, or source of a river which empties its waters into the St^t Lawrence, and of the existence of which source or spring there was no evidence or knowledge, but what was conjectured from the existence of rivers the mouths of which only had been seen.

From the year 1621 there was no Act of Government, no exercise of Jurisdiction, or claim of property from which this line could receive a Station but all was abandoned and lost in Treaties, Cessions, Conquests, re-conquests, by and from the French Crown, from Oliver Cromwell, and from the Kings of England.

Nor in acts of
Government until
Treaty of 1783

30

The Country of Canada was conquered in 1760. On the seventh of October 1763 the King of England issued His Royal Proclamation for improving the [and?] regulating the Islands and Country which had been ceded by the then late Treaty of Peace. In this Proclamation we find the provision, first: "The Government of Quebec bounded on the Labrador coast, by the river St. John and from thence by a line drawn from the head of that river through the Lake St. John to the South end of Lake Nepissin, from whence the said line crossing the river St. Lawrence and the Lake Champlain in forty-five degree of North latitude, passes along the High Lands, which divide the Rivers that empty themselves into the said River St. Lawrence, from those which fall into the Sea." The Agent for His Majesty has given the bounds of this Province (page 101, first part of the reply)¹ by a different line from that mentioned in the Proclamation. The line in the Proclamation is "crossing the River St. Lawrence and the Lake Champlain in forty-five degrees of North latitude." The line

¹ Supra, 217.

given in the reply, is from the Bay of Chaleurs, along the high-lands which divide &c to a point in forty five degrees of Northern Latitude, on the Eastern bank of the River Connecticut.

There is no such Angle described in the Proclamation, or in the Act
31 of Parliament, as is mentioned in the Treaty of 1783. The line by the Proclamation is to cross the S^t Lawrence on the forty fifth degree of North Latitude, which is on a degree nearly equal with the mouth of Scoudiac and Magaquadavie rivers, and very far south of the Angle now sought for: and far below every part of the High-lands referred to. No course, or courses are given to the line which is imagined on the high-lands, but all is left to imagination. This line could have had no influence on the minds of the Commissioners in 1783. In the Treaty of that date it is provided, that the line between the two Nations shall run on the high-lands to the Northwesternmost head of Connecticut River, and then down the middle of that River to the forty fifth degree of North Latitude, whereas the line of Proclamation was on the forty fifth degree at the Saint Lawrence, and so to run on the High-land to Lake Champlain without saying at what point it should cross the Connecticut.

The line supposed to be in an act of Parliament is still as far from the one contemplated in 1783. The line last mentioned, is to run on the high-lands to the Northwesternmost head of Connecticut River and then down the river to the forty fifth degree of Northern Latitude, but the one supposed to be in the Act of Parliament, is to run on the High-lands, directly to the point of forty five degrees, on the East bank of that river. It is easily to be seen that these lines may be more than one hundred miles apart.

The Agent for the United States has been informed and believes it
32 to be the fact, that the line between Quebec Government, or lower Canada, and the Province of New Brunswick, lately a part of Nova Scotia is at this day undefined, and quite unsettled—and furthermore that Commissioners have lately met from those Governments, and could by no means agree upon any line, as the one mentioned in His Majesty's Proclamation as above recited, or established by any act of Parliament.^a

^a The Agent for his Majesty p. 66 [supra, 197] tells us that the middle of the river was made the boundary by the patentees of the provinces in 1635. These provinces were never granted or their charters ever obtained. But if this had not been the case, a north line from the source of S^t Croix would have formed an angle very different from one formed by a line drawn north from the most western spring or fountain running into the river. The Commission of Governor Legge made in 1773, gives an angle very wide from both and forms it by a line drawn due north from the source of Saint Croix to the south side of the province of Quebec as one line of the angle.

It is a well known fact, that the rivers which empty their waters into the Saint Lawrence, and those that fall into the Western Ocean, derive their sources from various parts of the Country, in such manner that some of those from which waters run to the Northward are found fifty miles South of some of those from which rivers fall Southward into the Atlantic Ocean.

Thus we find no place for this Angle, so much relied upon, prior to the Treaty of 1783, and are now left to form it by running the lines in that Treaty agreed upon. The Agent ^{Angle to be found} for His Majesty proposes to find the river ^{by first ascertain-} from the Angle, but the Treaty leaves us to find ^{ing the rivers} the Angle from the River.

The conclusion made by the Agent for the United States is this:

That both Nations were at that time entirely ignorant of the precise situation of a point or angle which they intended, when found and ascertained, should be the place on which the boundary between their dominions should be established and marked.

That in order to determine that place, as nearly as could be done, it was agreed that a certain river which had theretofore been known and called by the name of the River Saint Croix, and which had been deemed and received as the Eastern boundary of the Province of Massachusetts Bay, should be taken as a part of the boundary; and 33 that to fix a line from the source of that river to the High-lands, both as a line for the Government of Massachusetts and Nova Scotia, it should be run due North; and that the termination of that line should be on what should ultimately be found when the Country should be explored to be the High-lands.

This is not a singular instance in that Treaty, of leaving that as uncertain which might afterwards be ascertained. The important boundary of the North Westernmost head of Connecticut River is unknown and unexplored. There are several other instances very similar to this, which appear on reading the second article of the Treaty of Peace.

We have come then clearly to this Point, that the North West Angle of Nova Scotia, much relied upon, is to be found by running a line due North from the source of the Saint Croix to the High-lands, to a point or place where that line shall intersect a line along the high-lands which divide ^{Determination of source of St. Croix} the rivers as beforementioned, and runs to the North Westernmost head of Connecticut river.¹ When a river is found which the honor-

¹ The last phrase evidently is confused. It should read—"a line drawn along the highlands which divide the rivers before mentioned, to the northwesternmost head" etc.—EDITOR.

able Board are convinced from evidence is the River truly meant and intended in the Treaty of 1783 as the river Saint Croix, and shall ascertain the Latitude and Longitude of its source, we shall have only to run a line due North to the high-lands, to find the boundary agreed upon in the Treaty. But still there is a previous question, viz. which is the River truly intended as the Saint Croix?

- 34 The Agent for the United States might ramble thro' a wild field, in answer to a great number of remarks and arguments, which have been offer'd on the other side.

The argument that it cannot be the constructive meaning of the Treaty to cede a part of Nova Scotia, might be answered by saying that the situation of the Country was such, and the evidence offered by His Majesty's Agent so very inadequate, that the Province of Nova Scotia appears to have been at that time a Tract of Territory with undefined or only imaginary boundaries, and that it was at least as necessary to furnish that Province with boundaries as it was to give boundaries to the State of Massachusetts; that though the principle in Vattel, that a province ceded in order to gain peace must be taken strictly, is good Law, yet, if it applies in this case, it applies as well on the one side as the other. But the fact here is that Great Britain and the United States both were under the necessity of making peace, and there was no other cession on the part of Great Britain than that Massachusetts, and all the States that were confederated with it, should remain Sovereign Independent States.

But as by the various Charters of the several Provinces and Colonies some of those states extended from the Atlantic to the South-Sea, including the whole of upper, and part of lower Canada, it became necessary to curtail their limits, and define their bounds.

- 35 The Eastern boundary would perhaps have been as it now is, had there been nothing said respecting it in the Treaty of 1783. This idea is had from good authority, which is offered before the Board. The Duke of York's Patent would have been considered as filling the space between the Kennebeck and the Eastern line of the State of Massachusetts, and extending on a Northerly course to the high-lands or province of Canada; and Gorges' Province of Maine as extending from the sea between the Duke of York's patent and New Hampshire, one hundred and twenty miles above the Heads of the rivers Kennebeck and Piscataqua, which would have carried that Territory to the full height of Latitude now claimed by the United States.

But the boundaries on the forty fifth degree of Latitude on the

Lakes, and over to the Mississippi, are completely a cession of an immense Country to the British Crown, unless it is contended that the States were not independent before the treaty of peace.

Upon this exposure of the lines, the mutual inclination of which is to give the Angle so much talked of, the Agent for the United States will traverse the fact in the same kind of Language as is used by the Agent for His Majesty.

Indefiniteness of
divisional lines

Can it be believed, or for a Moment imagined that in the course of human events such mere imaginary lines, drawn from a base undefined, and unrecognized, and delivered over to chance and accident for their guides, and supposed in every instance, but one, to terminate in a point, which no human eye had then seen or has yet seen, the Latitude and Longitude of which are yet with the undiscovered Comets, should form a controlling, well known angle for the directing boundary of the two Nations?

Can any man have the confidence to say that the Commissioners at Paris in 1782, in forming the second Article of the Treaty of Peace, had such a perfect knowledge of those most imperfect, various and inconclusive descriptions, that they could reconcile lines, mathematically irreconcilable, and form an Angle from lines, the positions, base and inclinations of which they were totally ignorant of?

Will there be any conviction or pretense of right, in the Argument of his Majesty's Agent, arising from the mere circumstance of the Treaty's providing that all Islands, theretofore within the Province of Nova-Scotia, should remain to His Majesty? This species of argument would perhaps have been necessary, if the Agent for the United States had contended that His Majesty had no such Province as Nova-Scotia, when the Treaty of Peace was made. But he has not contended in that mode, he has only said that the Province of Nova-Scotia, wherever it may be found finally to extend to, was not founded in a grant of King James to Sir William Alexander, because that Patent has long been abandoned, and the Provinces of Nova-Scotia and New-Brunswick are claimed and treated as publick Property, as Crown lands.

In page 103 &c¹ the Agent for His Majesty has many deductions in favor of his cause as to the establishment of the Angle contended for, but if it appears that his premises are altogether a mistake, his conclusions fall of course; whether he is totally, or materially mistaken, in regard to the positions and inclinations of the lines from which he forms his imaginary angle, the Board will decide.

After the Agent for the United States has undertaken to doubt the

¹ Supra, 313.

propriety of making confident assertions on the other side, it would not become him to do it on his own.

Once more. If the river Saint Croix is marked and described with so much accuracy and certainty in ancient and modern History and is so plainly seen, on ancient and modern maps, that it can be easily discovered and cannot be mistaken, an attempt to draw it from a source which furnishes no drop of water and to describe it by a mark which never existed, is a very extraordinary and unnecessary piece of labour.

If we take the line given in Alexander's Patent, as supposed or conceived, or imagined in that instrument, to run from the source of the Saint Croix, it has no course but is to run Northerly to the source of another river which was then and yet remains unexplored; and by that river when found down to the Saint Lawrence. Here no second line is given by the inclination of which to this, an angle could be formed, nor does the imagination conceive any form for the Northerly end of that Province.

The line of the King's Proclamation crossing the St Lawrence on the forty fifth degree of North Latitude, and Lake Champlain in the same degree, would intersect that line somewhere, but no one knows where. The Latitude or Longitude of the point of mutual inclination cannot be established, because we do not know where the spring or source of the river is, to which Alexander's line was to run from the
 38 source of the Saint Croix. This is not the line of the Treaty of 1782. That line takes a point on the high-lands for its departure, and without course or distance given, runs on the high-lands to the Northwesternmost head of the Connecticut, then down the Connecticut to the line which the Proclamation had given upon it.

The line of the Act of Parliament of 1774 is nearly the same: it is to run from the Bay of Chaleurs but without point of compass, and to strike the Connecticut on the Forty fifth degree of North Latitude. But the line of 1782 is very different from this, and gives quite a new angle for the North West boundary of Nova Scotia. This line is to run due North to the high-lands. The line of Alexander might under the word Northerly run North West, or North East, wherever the spring or source to which it was directed might be found. This was then of consequence, a very different side line: of course the line of 1782 runs to the high-lands, to a place or point where the rivers running each way were divided in their courses. Who has seen and can point that place? Had the Commissioners themselves an idea of it? Or was it left to future investigation? But when the line of 1782 departs from the point on the high-lands it does not follow the course

of Alexander's head line that went on a river to the Saint Lawrence. It does not follow the line of the Proclamation, or that of the Act of Parliament; these went on the high-lands to the forty fifth degree of Latitude, on the Champlain and Connecticut; this goes to the North-westernmost head of that river, and then down the river to the point that one, and perhaps both of the other lines are found on.

How vain then it is to aver, that His Majesty did not intend to cede 39 any part of Nova-Scotia, when in fact, [neither] he, nor any one else, knew then, or knows now, what Nova-Scotia then was, or is now.

Why should so much be said to make a boundary of an ancient and known Angle, when none in fact had ever existed, not even in imagination, as to its local situation.

The Agent for the United States feels himself entirely supported in the position that Nova-Scotia had no North West Angle prior to the Treaty of 1782, in the place where that Treaty made one; that the boundary of Nova-Scotia is as much to be formed from that Instrument as the boundary of Massachusetts, and that the point of its locality is to be the investigation of the next Century.

There can remain no doubt then that the North-west angle of Nova-Scotia is yet to be formed; and that this is to be done by forming the North East angle of the State of Massachusetts. To do this it has become necessary to find the
Northwest angle
yet to be formed

river which was truly meant and intended by the Commissioners who described the bounds, to find the source of that river, and to draw a line due North from thence. But even this cannot decide where the Angle is, because this Board has no authority to fix the line which is to be intersected, in order to form the Angle or the point of inclination of the two. The question resulting from the Treaty in regard to the line, upon the high-lands, is reserved to a future period. This Board has no concern in it as to its principles or 40 consequences.

The question so strongly urged by the Agent of His Britannic Majesty, that a North line from the head of the Magaquadavie would cross the St Johns, and furnish an interruption of several rivers emptying their waters into the Saint Lawrence must in part rest in conjecture. That the sources of the West branch of the Saint Johns, will on either hypothesis, be found within the United States is very true but this can have no weight in a judicial decision. Upon his hypothesis, nine tenths of the County of Washington, four fifths of the County of Hancock, and all the main branches, and sources of the Penobscot, will fall within the British Dominions.

Leaving these consequences we will now analyse the evidence,

which has been offered on both sides and which yet remains to be offered on the part of the United States upon this question.

Evidence as to
the St. Croix

The question is, what river was truly intended under the name of the river Saint Croix mentioned in the Treaty of Peace.

The manner in which this investigation is to be made, or the principles governing in the mode of this enquiry, may be necessary to be attended to.

We have no precise rules given to us by the writers on the Laws of Nations, or by Civilians on this point. It is true that much aid may be derived, and many pertinent ideas collected from those writers; but nevertheless, this is a tribunal established by no civil authority, but founded in a Compact between two Independent Sovereign Powers. It is in itself a Novelty, and will continue to be so until the natural disposition of the human race to war shall be happily changed, until the history of battles and sieges, rivers of blood and mountains of slain shall less delight the minds of men than the promotion of science, the diffusion of benevolence and the cultivation of the fine arts.

41

Lack of precise
rules

This being a Tribunal erected by a particular compact for a special purpose, to terminate a controversy of magnitude, there certainly is a propriety in resorting to the instrument itself in order to take directions as to the mode of procedure.

Treaty provisions
as to procedure

The second Article of the Treaty of Amity and Commerce recognizes that doubts have arisen [as to] what river was truly intended as the river St^e Croix in the Treaty of 1782. Any one who should read the reply of His Majesty's Agent, and not recollect that he is acting on the lines of an advocate, would be led to believe that there must be some mistake in transcribing this article; for he would there find so many confident averments of *there being no doubt on the subject*, that the reader would wonder how the ministry on the part of the United States, or on the part of his Majesty, could suppose there were any.

But this Instrument provides, that "the three Commissioners so appointed shall be sworn impartially to examine and decide the said question, according to such evidence as shall respectively be laid before them on the part of the British Government and of the United States."

42

Had the two Nations intended that the Commissioners should have taken the Treaty, and from the words contained in it, without attending to any other evidence, or circumstances resulting from any

other proof, have given it a construction, it would have been expressly so provided in the Treaty, or at least there would have been no provision for a special mode of Trial on such evidence as should be laid by the respective Governments before the Board.

This hypothesis is fully supported by all the statements of his Majesty's Agent.

In the second part of his reply, page 101,¹ he brings a description of the boundary of Quebec's Government, as making a description of the head line of Nova-Scotia. That this is inapplicable has been already shewn.

When he comes to treat of what shall be considered as the Saint Croix, truly meant and intended in the Treaty of Peace, he swells the cause with large quotations from ancient historians, and exhibits some maps and other documents.

Testimony of
negotiators

Where he attempts to give colour to his arguments from the exercise of Jurisdiction, he heaps up documents, State papers, acts of Parliament, grants of Territory and marks of civil Jurisdiction in a mountain before us. But nevertheless in page 3² in the first part of his reply, he says: "The Agent of the United States *seems* to suppose that to prove by the Commissioners themselves who made the Treaty of Peace, what river was by them intended under the name of the river Saint Croix mentioned in the Treaty is the same thing with, or equivalent to proving what river was truly intended under that name by the Treaty," and adds that, "this appears from his using the terms indifferently in the course of his arguments," &c.

The bare statement of the question in the words of the Agent of the United States, serves to shew that the Agent for his Majesty ought not to have made such an hasty and unwarranted deduction from it. 43

The proving in any way what river was intended by the Commissioners as the river Saint Croix mentioned in the Treaty, is no doubt proving what river was truly intended by the Treaty. But that this is to be done by the positive testimony of the Commissioners [as] to what was their intention, severally, in exclusion of all other evidence on the point, is a mode which the Agent for the United States never thought of.

That evidence of facts, which do not appear on the face of the Treaty, may be given to enlighten the path of investigation, in regard to its true meaning and intendment, cannot be denied by the Agent for His Majesty, since he has swelled the cause with such an immense collection of facts for that purpose, and since his exertions to that end have left Industry itself so far in the rear.

¹ Supra, 312.

² Supra, 260.

Two of the Commissioners are offered as witnesses in the case. It is true that these are Americans, but it is had from the best authority that Mr. Fitzherbert, now the Lord of S^t Helens, would probably agree in every fact which will be testified to by these Commissioners. There can be no doubt but communications have been made by his Lordship on this point, and his letter cannot be objected to as evidence in the case. It would give the Agent for the United States very great satisfaction, if his Lordship's colleagues were yet in the land of the living and would unite with him in certifying such facts as would lead to a fair investigation of the question.

- 44 Two of the Commissioners are offered to prove what the whole intended as the river Saint Croix, by proving as witnesses certain facts, the use of certain documents, maps and histories, which the Commissioners of both Nations had at Paris in 1782 and on the inspection of which they were led to adopt the description given in the second Article of the Treaty. It will not conclusively follow from thence that all the Commissioners intended this or that river. A Map is produced with lines marked upon it as the lines forming the United States. Upon that Map there appears to be two rivers only, which empty their waters into the Bay of Fundy.^a It is not contended that each Commissioner ought to be allowed to testify which river he intended. But if that map was before the Commissioners when they framed the second article of the Treaty of Peace, and those lines were then marked by them all, is it not a fact which in Justice ought to be proved? and would not any Clerk, or bystander, who happened to be present at that time, be a good witness as to the fact? Can the Witness having been a Commissioner, disqualify him from giving evidence?

It was then a well known fact, that the English Commissioners claimed the Penobscot as well as the S^t Croix, and that their claim was reciprocated by a claim of the S^t Johns. It seems that finally necessity, that thing so much abhorred, but without which Nations would never cease to make war, compelled them both to a middle line.

What is there in the course of this Trial, in which all the evidence respectively offered on both sides is to be attended to, that can exclude the testimonies offered by the Agent for the United States?

It may be viewed as to the Nature and course of the cause, and then

^a Whether the map on the table taken from the secretary's office of the United States is the identical map which was at Paris cannot be material, because there can be no presumption that there was a different copy of Mitchell's map there or any where else. The river marked as Saint Croix on each Copy is no doubt the same river, and there is as little doubt that the map here was the one which was before the Commissioners in 1782.

as to the authorities and maxims so much insisted upon by the other side.

Here it becomes necessary to be more particularly attentive to an 45
apparently serious and very learned objection made by his Majesty's Agent to the examination of witnesses on this point.

The propriety of the rule, cited from Judge Blackstone, is supported by the English and American Constitutions of Civil Government, and by the tenor of the Jurisprudence of each Nation. But there are a vast number of Judicious rules, good and valuable maxims, and wise political regulations, that can have no application to the question before us.

That a Legislature shall never be allowed to give a construction to their own formal and solemn acts, from a recollection of what they intended, when the Acts were made, is very readily agreed to. Much less shall an individual of such a
Interpretation of
legislative acts
body, be allowed to declare what he intended, when he gave his assent to them. Perhaps what he intended might have been inconsonant to the intendment of all the other members of the Legislature.

The signs by which an Act is to be interpreted are the words, the context, the subject-matter &c, or, as Pufendorf expresses it, these signs are two—words and conjectures. These rules apply where the Act contains on its face all the facts which are to direct the line of its operation, and the question is in what manner or to what degree, or for what space of time that operation is to be had. But when the subject matter on which an Act is to operate is undefined, uncertainly expressed, or inaccurately described, then the act is nugatory, 46
or facts not contained in the Act are to be resorted to. It is true as a general rule that we ought not to go out of an Act of Parliament for the means of its construction; but we will suppose a case. An Act of Legislature or a Patent under the seal of a Government creates a new Province, a new County—or a new Town. By this Act the Property of the soil as well as the Powers of civil jurisdiction is bound. Will it or will it not be proper upon a question before a civil tribunal, to introduce witnesses, to prove on the one side, and on the other, such facts as will have a tendency to explain the Act? The answer will most certainly be in the affirmative. But when the inquiry is what line, mark or boundary was truly meant and intended, will it not be proper, pertinent and legal to produce witnesses to prove that these very facts were before the Legislature, and considered by them when the Act was made? How the Legislature was affected by the facts, or what weight the circumstances had in their minds is a fact, but it is

one of such a nature that it cannot be proved by witnesses, but ought to be deduced from a reasonable consideration of the motives known or proved to have been before the Legislature or the authority which made the Patent. In the case supposed should it appear that a Mountain of a particular Appellation was the leading monument in the boundary, and yet there were two mountains of that name so near together that either might have been intended, and it would [should] 47 be proved that an artist had been sent by the Legislature to survey one of them before the Act was passed, would it not be proper to exhibit this fact in order to prove which was probably intended? Or could it be proved that a certain Map was before the legislature which passed the bill, on which one mountain was marked by the name expressed in the Act and the other designated by another name, would it not be proper to exhibit proof of this fact? It is acknowledged that in neither of these instances the proof would be necessarily conclusive, but it would have a manifest tendency to prove the issue one way or the other. Surely under a Compact for an extraordinary mode of trial, wherein it is expressly agreed that the Commissioners shall, in the construction of an Instrument of parties, not an Act of Legislation, decide according to such evidence as shall respectively be offered by the parties, the objection must have vastly less force in it.

The examples given in Vattel page 372 &c, are very apt to this point. The case stated is—The “husband leaves his wife all his money. It is required to know if this expression means only his ready money, or whether it extends also to that which is placed out, and is due on bonds and other securities. If the wife is poor, if she was dear to her husband, if there was found but little [ready] money, [and the value of the other goods greatly surpassed that of the money,] both in specie and paper, the husband to all appearance intended that she should possess all the money due to him, as well as that in his coffers. On the contrary, if the woman is rich, if there be found large sums of ready money, and if the value of what is found greatly exceeds the value of the other wealth, it appears that the husband intended to leave his wife only his ready money.”¹

Now here we have a construction derived from a great number of important facts, none of which appear in the face of the Instrument upon which the construction is had. There certainly must be witnesses admitted to prove that there were or were not large sums of

¹ Vattel, Book II. Ch. XVII. §270. The passages inserted in the text in brackets are passages omitted in the copy.—EDITOR.

money due on bonds and small sums in the coffers, or that the woman was poor, or was rich in order to form the conjectures on which the construction is founded. Certainly, if it could be proved by the same Witnesses, that the Testator at the same time had a paper before him, on which he calculated the sum he intended to bequeath and that sum, when the paper is produced to the Judge, contains a much larger amount than what was found in the coffers—this would be evidence tending to prove, in a very satisfactory manner, that the man intended to give the woman the money due on the bonds.

The case mentioned by the same writer; page 373. "A father who has an only son leaves to the daughter of his friend all his jewels: he has a sword enriched with diamonds, given him by a sovereign prince." This Sword is excepted, because it is not to be supposed that he intended such a mark of honor should pass out of his family; but if the testator had neither son nor heir the construction would have been otherwise.

These external or extrinsic circumstances do not appear on the face of the Instrument, but are derived from testimony. Could there be no other proof, such as his declaring that his son or heir was not worthy of the sword, that he kept it with, and counted it amongst his 49 Jewels, or that the husband of his friend's daughter was esteemed by him as more worthy than his own heir, there could be no objection to such evidence.

There seems to be in the books a mixture of the principles which relate to Sovereign Compacts, Acts of Legislature, and Contracts between parties who are the subjects of the same Prince. The above examples are quite consistent with what we find mentioned frequently by the English Judges, as in Plowden 205: "Which expositions have always been founded upon the intent of the Legislature which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances." In Modern Reports Vol: 2. P. 261, in the case of Archer and Bokenham, there is the same mode of expression "or quest by considering the form and design of the whole."¹

Vattel gives a very good rule, in page 374. and which has been well attended to by the Agent for His Majesty, that the parties ought to express themselves in a manner so as mutually to understand each

¹ The citation is wrong, the quotation obscure. See Archer v. Bokenham, 11 Mod. Rep. [2d ed.], 148, 161, where it is said that the meaning may be "guest, by considering the Frame and Design of the whole." In the 5th ed., by Leach, "guest" is spelled "guessed."—EDITOR.

other. In this and several of the following pages this principle is urged with great strength of reasoning. But whoever reads him is obliged to confess, that he is treating upon the consequence and importance of using unequivocal, and definite expressions, in describing the obligations assumed by the parties, and not of the difficulties resulting from two rivers, two mountains, or any two boundaries, having the same name, or of their being not well described in a Treaty. He gives this rule, page 377, "now the interpretation should only tend to the discovery of the will of the parties."

- 50 The maxim mentioned by the Agent for His Britannic Majesty, page 6,¹ that interpretations ought to be made according to certain rules, by which the parties concerned must have certainly understood them, when the Act was prepared and accepted, is no doubt on a good principle.
- Other maxims

The reason there given, as cited from Pufendorf, is a valid one, that "Princes are obliged by the Law of reason, to receive interpretations founded on just rules." But in the case before us, where is the rule which is to govern us? If the case was plain, manifest and easy from the rules of interpretation, according to the language adopted by Nations, we might resort to books and examples. But the controversy here is upon a matter of fact which both Sovereign Powers have agreed shall be decided by Commissioners, "according to such evidence as shall be laid before them by the parties." This mode is adopted, because the controversy does not depend upon the intrinsic construction of a Treaty.

In page 7 of the first part of the particular reply the Agent for His Majesty gives us a rule that, where "we meet with obscurity, we should seek for what was probably in the thoughts of those who drew it up, and to interpret accordingly."

His application is, that the word *probably* excludes the idea of a resort to the Authors, or to the contracting powers themselves to interpret their own Act.

- 51 This matter when viewed in its proper and natural light, is very easily understood. If there is a controversy between two Sovereign Powers on the interpretation of a Treaty, neither will resort to the other as a Judge, but each will give the Instrument such a construction as he shall think proper to give it. And however widely they may differ in their construction, neither will yield to the other. In this case the history of the business as taken from the communications or recollection of the men who compiled it will have great weight on each side. And no evidence can in the nature of things be offered

¹Supra, 261.

on either; because there is no tribunal to raise the obligation of an oath, nor any necessity of developing it upon any one.¹

But in the case before this Board neither party is satisfied or confident, as to a certain important fact. Doubts are acknowledged to exist, and a tribunal is formed by a Convention between two Sovereign Powers to decide the Question.

If the question was simply this, "what river was really the river S^t Croix in the year 1782," it might under certain circumstances have been a different question from what it now is. The question before the Board is not, what river was in fact the river S^t Croix at that time, but what river was in the Treaty of that date, *truly intended* as the river Saint Croix, and forming a part of the boundary therein described. Still it is to be acknowledged, that though evidence of what was in fact the river Saint Croix in 1782 is good evidence to guide us to the intendment of the Treaty, yet it is not conclusive but may be controlled by other evidence; because the Treaty might intend a river very far from the one then known by that name.

Could the Agent for his Majesty prove, as he seems to hint that he can, that the Penobscot was the river marked out and designated at that time by the Commissioners as the boundary there could be no reasonable objection to his doing it.

The conclusion in the same page, that it is clearly intended by 52 the Treaty of Peace that the United States should be bounded on the East by that River Saint Croix, which there formed a part of the Western boundary of the Province of Nova Scotia, may be true but yet there are no proper premises from which it may be concluded. That the West line of Nova Scotia was then considered as the East line of Massachusetts, there can be no doubt of, and that the North West Angle of Nova Scotia and the North East angle of the United States should rest upon the same point, may be agreed to. But yet the Commissioners were under no obligation from any former establishment if there had been any.

The assertion, page 9,² that it has been proved that the Scoudiac was the Saint Croix and the Western boundary of Nova Scotia, and that the Magaquadavie was not the River intended by the Treaty, may remain for the present. There is a wide difference between a fact

¹ Mr. Sullivan, in saying that "no evidence" could "in the nature of the case" be offered on either side, apparently had in mind only the case of the refusal of the sovereign States to agree to the establishment of a tribunal for the trial of the cause, and did not intend to imply that, if such a tribunal were created, evidence could not be taken on oath in the ordinary way, just as was done in the case of President Adams, John Jay, and others.—EDITOR.

² Supra, 263.

proved to exist, and what a party or advocate declares to be proved to his *own full satisfaction and belief*.

There can be no necessity for burthening this cause with quotations from books. The rule cited from Vattel—that neither the one [n]or the other of the interested or contracting Powers has a right to interpret the Act, or Treaty, at his pleasure, forms no objection to the admission of such evidence as may prove what facts were considered by the parties contracting at the time our Treaty was made. This rule of the writer is laid down as a rule of morality, from which Princes ought not to depart,—but in the next section he observes, “that sovereigns acknowledge no common judge, no superior that can oblige
53 them to receive an interpretation founded on just rules.”

Pufendorf condemns the idea of a Power being a Judge in its own cause, and yet he with other moral writers, acknowledges that there is no common Constitutional Judge between Sovereign Powers.

The Agent for his Britannic Majesty has taken the Freedom in this instance to raise a motion or question for the Agent of the United States, [and] to give this question such form as is agreeable to him and then to combat it in his own way. He supposes that if all the Commissioners might be present, and were to testify, that the River Saint Johns, the Penobscot, the Scoudiac or the Magaquadavie, was the river intended, that this testimony would be conclusive or not conclusive, and if it were not conclusive, it would be nugatory, idle and inadmissible.

The Agent for the United States does not make such a motion, or state such a question before the Board. The Treaty he considers
Position of philosophically speaking as intending nothing, but as
American Agent containing evidence of the intendment of the men who
as to proofs made it, yet he does not consider what might now be
expressed, on recollection of the Ministers who framed the Treaty, as
conclusively what was intended by the Treaty. But as doubts have
arisen respecting one fact or circumstance, which if ascertained would
give a construction to the Treaty as to a local right, and as the Powers
who are parties to the Convention have agreed to have those doubts
examined and decided upon by Commissioners according to the
evidence offered by each Government; as¹ this controversy can never
54 be determined upon any construction of the words of the Treaty, but
evidence *dehors* must be resorted to by each Power.

As the evidence of what had before, in ancient or modern times, been the river called the Saint Croix, cannot be conclusive as to what

¹ So in the official copy; but the passage is sensible and coherent if the semicolon is changed to a comma, and the word “as” is omitted.—EDITOR.

was truly intended by a river of that name in the Treaty, the Agent for the United States proposes to offer oral and other evidence to prove—First:

That the Commissioners in 1782 contended for Penobscot river, on the one side as the boundary to be established, and for the Saint Johns on the other. That there was no Act of the British Parliament for restricting the bounds of Massachusetts before them. That they had no copy of Sir William Alexander's Patent, but that they had a Map published before the American Revolution, by John Mitchell as a Map of His Britannic Majesty's dominions in North America. That on that Map the Commissioners marked certain lines as the lines of the United States agreed upon in the Treaty of Peace. The [that?] evidence is further necessary to prove that the Map now presented to the honorable Board is the Map on which those lines were so marked, and that the same lines remain there now, or at least that the one on the table is an exact copy of it as well as to the river as to the lines marked.

The argument, that as a declaration of what was intended, would either be conclusive or not, because that if the Commissioners were all to testify in favor of the one or the other river, there could be no need of Judges to determine the case, can hardly be taken to be serious. The object is to find out the intent of the Commissioners 55 from the Treaty and from foreign circumstances, as is commonly done in other cases, where a fact, not solely a construction, is sought after. When the fact is found the Construction follows of course. Here it is intended to enquire of Witnesses what circumstances, maps, histories and other information were before the Commissioners inclining them to the one river or to the other.

A question is asked supposing all the Commissioners were present and they should disagree in their opinions, what would be the result? The answer is that if the Commissioners on both sides were present, and should disagree upon the recollection of the Maps, papers &c. which were before them, whether there was a coincidence in the recollection of those of each nation respectively, or whether the division was merely personal, yet they would be but witnesses, and their testimony would be left with the Board to decide upon it, as in other cases.

The Agent for His Majesty concludes, page 16,¹ that if Mitchell's Map is admitted the question will still occur, and the same difficulties, and the same objections will still exist—because if that River, (meaning as is supposed the river thereon marked by the Commis-

¹ Supra, 266.

sioners) was not the Western boundary of Nova-Scotia at that time, and if a line due North from the source of it to the Highlands did not form the North West angle of Nova-Scotia, it could not be the river truly intended. And he goes on to say, that if the river marked on
56 the Map of Mitchell is the Magaquadavie, yet as a line due North from its source, would not make the North West angle of Nova Scotia—it would only prove that the Commissioners were mistaken in supposing that to be the true river.

This objection often occurs in the statement of His Majesty's Agent, but the Agent for the United States most cheerfully submits it to this honorable Board to decide, whether he has not fully answered this argument by shewing that there was, prior to the Treaty of Peace, no definite side line to Nova-Scotia, and that all the lines proposed in the Patent of King James to Alexander, in the King's Proclamation of 1763 and of the Act of Parliament were inadequate to the establishing a side line or of forming a North West Angle for that Province—and that the province is now to find its North West Angle from the Treaty of 1782, in the same manner that Massachusetts is to seek in the same Instrument for its North East Angle.

The Agent for the United States, part 3, Sect. 7,¹ has, in his argument adverted to the question in language much stronger than he intended it,—that we should be naturally led to ask the Commissioners what river they intended. He never had it in his plan to go further than an enquiry into the facts, which the Commissioners acted upon. Yet he is very far from being of the opinion that it would be improper to enquire of them whether the River they agreed upon, was the river next, or the next but one to the Saint Johns.

57 There is no doubt of the rule in Vattel, that Powers are obliged to express themselves so as that they may mutually understand each other, and may not be permitted to deviate &c. But here it is agreed by both powers, that they have expressed themselves in such a manner that they do not mutually understand each other, and what is to be done? are they to be punished for the breach of the Law? or for breach of faith? They have agreed to arbitrate on the question, and that the Arbitrators shall decide accordingly to evidence laid before them.

This is not a question whether evidence which has no pertinence to the issue shall be delivered to the Jury—but it is a question of what weight, under all circumstances certain testimony can have on the issue,—of consequence it will be taken *de bene esse*, and the effect of it

¹Sect. 15, *supra*, 143.

cannot be known, otherwise than by that declaration which will be the final result of the business.

It has already been considered, whether any rules prescribed in the books, can be opposed either to the pertinence or force of this evidence. It may be proper now to consider, whether the form of this trial does not allow such evidence full weight and efficacy. Admissible evidence under terms of the treaty

There can be no pretence that the Testimony is opposed to the letter of the Treaty, because it is not yet settled nor can it perhaps be settled, that there was a Northwest angle of Nova Scotia prior to the Treaty of Peace, even in imagination, near to where that angle is placed by that Treaty, and that therefore there is no fixed and certain point from whence a line is to be drawn, in order to find the source of the river, but the angle is to be found by a north line drawn from the river's source. The Treaty mentions one river only,—were the witnesses even to swear that the Magaquadavie was the river intended, still it would remain a question whether the testimony is opposed to the Treaty, until there is an ultimate decision of the cause. The objection then is interwoven with the merits of the case, and to prevail in it would be to procure a prejudication of the cause. 58

But if the Treaty is considered on the ground of a compact between two Sovereign Powers on the footing of a covenant of individuals or as having the force of an Act of legislation—yet it is very clear that the Treaty of 1794 is a subsequent act of the same parties, wherein they can annul, alter, change or explain the preceding one. They certainly then have full authority to give rules for its construction, and to establish a mode of investigation where doubts have arisen on the interpretation of it. The parties have done this. They have by convention agreed that this Board shall decide upon certain doubts, which involve one very important fact. And that this Board, being duly sworn shall decide the question, according to such evidence as the two governments shall respectively lay before it. It would then be a very extraordinary thing, if the Board shall say, that evidence however pertinent it may be, shall have no weight. And more so if it should be determined to exclude the evidence offered on either side, under the Convention referred to. 59

In considering the question on the evidence submitted, what river was truly intended by the Treaty of Peace as the river Saint Croix therein mentioned, as describing a part of the boundary therein contained, the Agent for the United States proposes to adhere to the method suggested in his first statement. He will have the honor to consider,

First—

What river was contemplated as the boundary between the late Province of Massachusetts Bay and the Province of Nova Scotia, at a time when there appears to have been an implied relinquishment by the former, of the land on the East of the River Saint Croix in the year 1703, and what has been considered as the boundary from that period to the year 1783.

Under this head it may be proper to consider the testimony of witnesses, acts of governments in grants, in declarations, in claims and in the exercise of jurisdiction as well as historical facts, maps &c.

Secondly—

To consider whether, if the Agent for His Majesty has proved the Scoudiac to be the river Saint Croix, known by that name before the year 1703, any inferences, pertinent to the Question before the Commissioners can be drawn from the fact,—and

60 Thirdly—

Whether any conclusive proof has been offered, to shew that the Scoudiac was the ancient Saint Croix river.

In this arrangement, he proposes to contemplate all the evidence and arguments which have been offered by his Majesty's Agent to prove the Scoudiac to be the boundary intended in the Treaty of Peace.

Before the Argument is commenced, it may be proper to take a view of the Situation of that part of the Country, as it appeared, in
 Situation in dis- and about the year 1700. Information upon that
 puted territory point will most certainly tend to aid the Board in its
 about 1700 enquiries as to other important facts in the case.

The French had been in possession of the Country from 1667 to 1690, —of consequence, there was no possibility of its being explored by the English Nation. From the year 1675 the Savages were all attached to the French Government, under the direction of the Baron Castine, a French Nobleman, who resided near Penobscot, and these were all opposed to having the Country explored. From the Treaty of Utrecht, the wars were without intermission. The whole Eastern Country had been cut off in 1676, and again in 1690, and was not resettled until 1718. The wars were again commenced in 1727, and no peace concluded until 1736. The war again commenced in 1743, and was not concluded until 1747. The Nations in effect began a war in 1749, but it was not a solemn and open war between the French and
 61 English until 1754. But in this time the Savages were committing depredations, and the French on their claim to Acadie stimulated them to prevent the Country from being explored by Englishmen.

There was no adequate idea of the position of the courses or the size of the rivers excepting at their mouths, before the year 1763.^a The various opinions entertained on the subject, after that time, will be properly considered. The Agent for the United States having introduced Mitchell's Map, will now attend to the force of the evidence which it affords; and then shew its connection with other plans, and other documents which have arisen since the date of 1691.

The general idea, or opinion of the situation of the Country, at that time, as to the extent of the Massachusetts Province is naturally and necessarily connected with the Map of
Mitchell's map
 Mitchell.

This idea connects itself so intimately with the ancient grant to the Council of Plymouth by James the first, and with the Charter of Charles the second to the Duke of York, that both are to be noticed.

By the Charter of King James, issued in April 1606, to the Virginia Planters, it is provided, that Thomas Hanham, Raleigh Gilbert, William Parker, and George Popham should be
Virginia Charter,
1606
 joined to the Virginia Company, and called the second Colony of Virginia;^b that they should "begin their said Plantation and Seat of their first Abode and Habitation, at any Place upon the said Coast of Virginia and America, where they shall think fit and convenient, between eight and thirty Degrees of the said Latitude, and five and forty degrees of the same Latitude." And they were to have the land for the space of "one hundred miles directly over against the said sea coast."

62

This Company settled at Sagadahock in the year 1607.^c

By the Charter the North Virginia company were to improve as high upon the Sea Coast as to the forty fifth degree, North of the Equator, but the direction is given them, as to the course from the sea, in which their improvements shall be made, "one hundred miles directly over against the sea Coast." This was the original description of what was always afterwards called the North boundary of North Virginia. If it was intended that the North boundary should have been fixed upon the 45th degree of latitude, there could have been no need of any other description as to the side lines, than the 38th and 45th degrees of North Latitude, and to extend for the space of one hundred miles from the Sea, and within or between those lines. But the Charter contemplates the sea coast as lying *towards* the East and West and the improvements are to be extended, one hundred miles—over against the Sea.

^a Before the recession of the Massachusetts, and after the Treaty of Ryswick and perhaps before the Indians had given the resemblance of the Rivers.

^b Hazard's Collection, 1 Vol. 52.

^c Hutchinson, 1 Vol. p. 2.

The Patent of Alexander in 1621 contemplated the same side line, for the course is to be from the source of a river then unexplored, Alexander Grant (*versus septentrionem*) towards the North to the source of another river then unknown. Here again the lines of Latitude were not regarded as a governing principle for the boundaries of the side line. In 1647 the King of France, by letters patents granted and confirmed to the Sieur d'Aulnay Charnisay, the Government and possession of Acadie from the bank of the Saint Lawrence to Virginia. Here was an acknowledgement of a line of North Virginia to begin on the 45th degree of North Latitude and to extend North from the sea because if the King intended the 48th he must have carried his grant to d'Aulnay beyond or North of the river S^t Lawrence.^a

Perhaps the next public document which ought to be considered on this point is the grant to the Duke of York in 1664, to extend "from a place called Saint Croix, next adjoining new Scotland in America, along the Sea Coast to a place called Pemaquid, and to the river Kenebequire (Kennebeck) and so upwards by the shortest course to [the river of] Canada Northward."

That a line should run from the sea Northward, seems to have been intended by all these documents. And it will appear by the Maps, as well English as French, that the attention of both Nations was formerly and recently fixed upon a line running North from the Sea to Canada. And further that no one map can be produced as formed before the Treaty of Peace which exhibits a river as the Saint Croix, of Passamaquada Bay, with courses in any wise similar to those of the Scoudiac as now contended for by the English Government, or bearing a line of division between New England, or North Virginia, and Nova Scotia, similar to that which is now contended for by the Agent for his Majesty.

The Agent for His Majesty seems to continue his objection to Mitchell's Map, upon the idea that if a south line from the Northwest angle of Nova Scotia cannot strike the source of the river thereon marked as the river Saint Croix, that the river, let it be marked by whom it may, is not the true river. The Agent for the United States conceives that this objection can have no force, unless the English Government can establish a Northwest Angle as existing before the Treaty of Peace on such a point as will perfectly coincide with the boundary in that Treaty described. He submits it again to the Board, whether he has not fully shewn, that all the arguments at-

^a 2^d Vol. Mémoires. [P. 282.]

tempted on the supposed foundation are fallacious, and without any just conclusion.

On the question, whether the Scoudiac was intended by the Treaty of Peace as the river Saint Croix, the Agent for His Majesty considers the Map of Mitchell in his favor, and that the Eastern river therein marked as the river Saint Croix is clearly Marking and
names of rivers what he now calls the Scoudiac. To support this he considers the two rivers exhibited on that Map as the river[s] Scoudiac and Cobskook. It is true that the Map of Mitchell is a very imperfect representation of that as well as of other parts of the Country, but a few considerations will clearly evince that the rivers thereon exhibited are the rivers Magaquadavie and Scoudiac, and that the former is noted on the Map as the Saint Croix and the latter as the Passamequodie. 65 There is one thing very remarkable in the business, that there never was a map before the conquest of Canada, if before the American Revolution, that marked any river in that Country by the name of Scoudiac, [but] that all bear a river called Passamequodie; and yet the Indians all testify that they never knew a river by the name last mentioned, and yet always knew one by the name of Scoudiac which signifies burnt ground.

On Mitchell's Map, the river Saint John is given with some degree of correctness. The next stream to it is the river Mechicar, but of no consequence in this case; the next stream is called Carriage river. This is beyond controversy the water laid down upon Wright's and Holland's survey as the Etangharbour (in English, Pond Harbour).

These appellations coincide because the reason why this is called Carriage river, is that the Indians carried their canoes from the head of it unto a pond or lake on the North East side of the Magaquadavie, now by the English called Lake Eutopia, and which is seen on the map composed from the actual surveys made by the order of the Commissioners. The carrying place from the one to the other appears to be but about 100 rods. The name of Pond Harbour, is derived from the same source; as the Indians carried their canoes over from the harbour to the pond or lake.

In the next river and which is on Mitchell's Map marked with the name of the Saint Croix river, there is a small branch represented as coming in from the North East, which corresponds with the stream which appears on the plans of actual survey, as issuing from this Eutopia Lake into the Magaquadavie. 66

The river contended for on the other side, is said by the Agent for His Majesty to have its mouth between the southwest point of Saint

Andrews, or Jose's Patent,¹ and the Shore over by Brewer's. This is fourteen miles from the Bay of Fundy, where the second article in the Treaty of Peace gives us a line in the middle of the river Saint Croix, from its mouth in that bay. The river represented on Mitchell's Map is a river extending from the Passamacadie, on a point about northwest to a large Lake called Kousaki Lake, leaving a North East Branch some distance on this side the Lake. Whether the description of this Lake was had from the Indians or not, yet the Board will observe that [the] course up the river from the Bay to the Lake is similar to that of the Magaquadavie, as on the plans of survey, and that the Lake found on actual survey is Sixty miles from the Bay, and answering the appearance of this Lake on Mitchell's Map, as accurately as the actual appearance of a body of waters ever is found to be similar to that which arises from a mere description from a view, or from historical account only.

- 67 The waters contended for by the English government are a part of the Passamaquodie bay before the mouth of the Scoudiac is in fact found, and from thence on about seven miles of small tide, flowing in a West course to Scoudiac falls; then on a stream of fresh water for the space of——² miles, and then, leaving the denomination of a river, is a chain of Ponds on a course about South, Seventy two degrees west for the space of forty miles, as appears by the Map returned. There certainly has never been a Map, as has been once already observed, which contemplated a line similar to that for the Eastern side line of Massachusetts or the West side line of Nova Scotia.

When on Mitchell's Map we attend to the Body of waters now called Passamequodie Bay, we do not find it marked with that name there, but an Island which is Deer Island is called Passamaquoddy Bay Passamacadie Island. It may be further noted, that the river Saint Croix is not placed on the same point in the bay as the Magaquadavie is in fact found to be, nor is the point of the bay, where nature has placed the Scoudiac, the same as where Mitchell has placed his Western River. When the Scoudiac is examined, it is found that the Bay, or River, extends on an East south East course, through a channel between the main on the North and the Island of Saint Andrews on the South, to the East of Saint Andrews, and there being from thence to the Eastern Shore about three leagues and an half wide, it extends as much as nine miles up North-
68 erly—containing a great number of Islands of various sizes and divers appearances.

¹ Evidently an error in official copy: the preceding text speaks of a point; see, also, Joe's Point, *infra*.—EDITOR.

² Number unintelligible in the official copy.—EDITOR

On Mitchell's Map there is no representation of any bay extending northward and above the mouth of the river which he marks as Saint Croix; but, taking what he calls the Passamacadie river as the Scoudiac, we have the point of Saint Andrews laid down as perfectly as any thing is done in the Map. This point is almost rendered a Peninsula by a small inlet of [or?] flood from the Sea through the Scoudiac to a sheet of waters lying back of the point. This inlet appears on Mitchell's Map, but [is] not perfectly represented.

Passamaquoddy
River

This river called Passamacadie could never be intended for the Cobscook because it is represented as a river coming from the inland part of the Country, nearly as far as the Saint Croix—whereas the Cobscook is but an inlet from the sea, into which there is no considerable stream of fresh water running from any considerable distance. In one word the position of the Cobscook will not answer to the Passamacadie on Mitchell's Map, from either its distance from the head of the Bay, or its situation as to the Islands, or other River.

The suggestion of His Majesty's Agent that the river Magaquadavie, was too incon siderable to have a place on Mitchell's map is one of those *humorous strokes*, which tend to take off the burden of attention, and to render business pleasant. The great objects of our becoming acquainted with rivers in former times were the fisheries in them, and the trade they produced with the Natives. To suppose that a river which will bear to the first fall in the Magaquadavie, about five miles from the Passamaquodie bay and about twenty from the bay of Fundy, vessels of a larger size than can be carried to the Scoudiac Falls, was entirely unnoticed, is well enough for a stroke of wit but no one will venture to urge it seriously. To find the Harbour Etang, or Carriage river, noticed as a path to one of the Lakes on the Magaquadavie, and yet the River itself not to be thought of, would be an extraordinary circumstance.

River Magagua-
davic

The map of Mitchell was a collection from Maps then in being, and not protracted from actual surveys, and there is no doubt but that he depended much upon the one which had been published by Captain Southack. The design of representation on both, appears to be the same. In Southack's map a point of land is laid down as a French settlement, bounded Westerly by Passamaquodie river, southerly by a narrow passage between an Island easily seen to be what is now called Saint Andrews Island, and on the Northeast by a bay of waters now by the English called Passamequodie Bay. The river marked on that map

Mitchell's map
a composite of
earlier maps

as the river Saint Croix appears to be nearly if not exactly the same course from the mouth of Passamaquodie as the Magaquadavie is now found to be from the mouth of the Scoodiac.

The French Map, annexed to the first Volume of Memoirs of the proceedings of the English and French Commissioners, exhibits the same idea of the Northern river in this bay being called the Saint Croix.

The Maps from that of Southack down to 1763, being considered, must serve as evidence on the question of what line was contemplated by the Government of Great Britain and the province of Massachusetts Bay as being relinquished by the latter to the former in the year 1703. It is very clear that Massachusetts was contented with the line of Gilbert, Popham and others, as described in the Charter of James, and with the line of the Duke of York's Patent described [as] running to a place called Saint Croix and on a North course to Canada. That the Province included the patent of the Duke within the Charter of 1691 appears from the collection of the Records of his Province, and [the] depositing of them in the secretary's office, where they now are, as is certified by him.

- 71 The Map of Mitchell being of much importance in this controversy the honorable board will be pleased to pay a minute attention to every part of it.

Examination of
it in detail

There is an Island represented on that map called there by the name of Passamacadie-Island. One intention of forming the Map was to correct the errors in others, as to the Islands, rocks and harbours.

In this, the rocks or islands called the Wolves, which have been seen by the Commissioners, are laid down, so that an East line from the middle of the Island of Passamacadie will strike through the northernmost of them. When we come to examine the perfect, and well executed map of

Passamaquoddy
Island

- Des Barres, we find that a large island is delineated in Passamaquoddy Bay, stretching nearly across it, in the same manner that the Island called Passamacadie is represented to do in the Map of Mitchell. An east line from the middle of that strikes through the Wolves in the same manner; from this it is at once seen that the Passamacadie island in Mitchell is the Deer Island of Des Barres. From this fact, there are other very conclusive, and very important facts to be deduced.

The one which is most obvious is that the Cobscook cannot be one of the rivers represented on Mitchell's map, because it appears from Des Barres' and other exact charts, that the Island called Moose

Island is on the South West side or end of Deer Island, or Passamacadie Island, and that the mouth of the Cobscook is on the South of Moose island, whereas the two rivers represented by Mitchell are on the Northwest, and North of Passamacadie or Deer Island. 73

The river contended for by the Agent for His Majesty is on the West side of Passamaquoddy bay, and as has been already observed is divided from Deer Island, by a large body of waters without Islands.

On the map of Des Barres the south end of Grand Menan Island is laid down to be in sixty six degrees fifty one minutes west longitude, from the royal observatory at Greenwich, that is from Saint Paul's Church in London 66.46—the map of Mitchell places it in about 66.36; the mouth of the Magaquadavie in Des Barres is 66.51, in Mitchell the Saint Croix stands at 66.30 or thereabouts.^a A due north line from Grand Menan, as laid down by Mitchell, will pass from the south end of that Island through the middle of Deer Island, and to the mouth of the Saint Croix: but to go from the middle of that Island to the Scoodiac, you must go north west. A line drawn from the Scoodiac south east, instead of passing on the south end of Grand Menan, will go to the eastward of every part of that Island. A south east line from the river called the Passamacadie on Mitchell's map will cross Deer Island or Passamacadie Island in the same manner as a line from the Scoodiac, on Des Barres' Map, will cross Deer Island as laid down on that map. 74 75

The form of Deer Island, on Des Barres' chart, is the same as Passamacadie on Mitchell's Map.

It is true that the place and form of the River Magaquadavie is not laid down accurately by Mitchell, and the same observation applies to the river on the West of the Bay, which is now called the Scoudiac, by him the Passamacadie.

There is a defect in Mitchell's map in not representing the bend near the mouth of the river properly, but this may have been owing to the smallness of the scale on which the Map is drawn.

There is on this map a due north line drawn through the centre of the Island there called Passamacadie since called Deer Island, and to the mouth of the river there called the Saint Croix. There is no other instance of that kind on the map. We have a field of conjectures opened to us on this fact, one of which is that this was intended to represent the centre line of Razilly's commission, and that it was then believed that this was the Island Saint Croix. 76

^a The mouth of the Saint Croix is laid down by Mitchell in the same degree of Latitude as Des Barres has placed the Magaquadavie in. [The figures, *supra*, are given just as they are found in the official copy; but the reader will understand that they refer to degrees and minutes of longitude.—EDITOR.]

But perhaps a more likely conjecture is that the line was there drawn in 1750, or 1755, to represent that river, as an important boundary between two Provinces; this conjecture gains great strength from the river's being represented as comparatively larger than it ought to be when seen on the same map with the Scoudiac.

- 77 The river coming in on the westerly side of the bay has no other name than the Passamacodie, and the water between Deer and Moose Islands, and between them and Campo-Bello, had then and yet have the same appellation, which as the Indians tell us means the waters where pollock are taken.

The Agent for the United States submits it to the board, whether it does not clearly appear that the river marked on Mitchell's Map by the name of the Saint Croix, [and designated] in colours by the Commissioners who made the Treaty of Peace, cannot be the Scoudiac; but that it is a river on the northerly side of the Bay called Passamacadie Bay.

When we speak of the Scoudiac it ought to be remembered that this is a name given by the Indians but not marked in ancient maps, but that the river was formerly called the Passamacadie.

- 78 The river Magaquadavie has had no other name on any map, in any history, or by any persons as an English name, or as an Anglified, French or Indian word, but that of the Saint Croix.
- River Magaguadavic and the St. Croix This affords a powerful argument, that it has always been known by that name. There is no instance from the Saint Johns to the Kennebec, where a river has rested upon the Indian or French appellation, without having a new name, or a double name, or having the French or Indian name under an Anglified pronunciation or termination; it may therefore be very reasonably concluded that this river always has been known to the English people by the name of Saint Croix.

- 79 From the year 1632 to the year 1690, the whole country of Acadie and Nova Scotia was under the French Government, excepting in the short interruption of Oliver Cromwell's conquest. We have no right therefore to expect any charts or maps made by the English in that time.

The French had no interest to induce them to designate the river Saint Croix as a boundary. The Commission to Razilly in 1632 was described, as extending six leagues on each side of the Isle where De Monts wintered, but nothing is said in regard to the river Saint Croix.

The Commission of D'Aulney was from the middle of the Bay of Fundy to Pentagoet, and had no other river as a boundary; and there was no other river mentioned in it. There was no other grant made

in which we could expect to find that river mentioned; wherefore, it was of no importance to designate it upon any French map. But when afterwards it became a matter of investigation, as will hereafter be shewn, the ancient French charts in the royal marine deposits were attended to, and copies taken from thence, which are all in favor of the argument on the American side of the controversy.

When the whole Country was ceded to the Crown of England by the Treaty of Utrecht, in 1713, it became necessary to gain a view of the Country, but a number of catch penny authors imposed erroneous maps on the public, until it became expedient for the Lords of Trade and Plantations to correct the abuse.

This was attempted in the year 1750 by the Map of Doctor Mitchell which is a Governmental Map, licenced and approved by their Lordships as appears by the certificate of John Pownall, who was then 80 secretary to that board, and was compiled principally from the surveys and collections of M^r Jefferys, Geographer to the King. The same Jefferys published a map about the same time, and if that differs from Mitchell's it is only an objection to his own authority.

The memorandums which are on that map, justify the suggestions made on this subject. The first edition of the map was in the year 1750. It was addressed to the Earl of Halifax, who was then on the ministry and one of the Lords of Trade and Plantations; that Nobleman was in his administration the Patron of Nova-Scotia and had the honor of the Metropolis being named after him; the lines of it were under his care in a peculiar and interesting manner, and therefore we cannot believe that a line of property and jurisdiction could have been drawn between that and a charter Government unfavorably to it. 81

This map was in fact a document, and record of State: it contained the expression of the Governmental opinion, and was the judgment of the Sovereignty, so far as the Sovereign Power held the right of decision.

This map was furthermore done with the express intention to correct the errors which had taken place in the Charts of the Sea coast, and therefore, as it was an act approved by the Lords of Trade and Plantations, it is to be presumed to have a great degree of exactness upon it. 82

The Agent for the United States has examined the maps and charts, which were published before the fourth day of July in the year 1776, and has seen that they are all combined in their tendency to exhibit the Magaquadavie, or a river on the north side of Passamaquoddy bay, running on a general south course to that body of waters, as the river anciently and

Maps since
July 4, 1776

lately called the Saint Croix, and as the marked and acknowledged boundary of the line between the Governments of Nova Scotia and Massachusetts. It may be now proper to consider, such maps and charts, as have been published since that time.

In the year 1777 Thomas Jefferys Esq^r. Geographer to the King of England published his American Atlas, containing a description of the whole American Continent, and chiefly the British Colonies, composed from the surveys of Major Holland, Lewis Evans and others. In one sheet of this map the whole Continent is represented. The bay of Fundy is exhibited on a very small scale. The bay of Passamaquody is there laid down under that denomination in a proper manner. In that sheet, a river is represented as coming from a lake situated due north from the bay, at the distance of about sixty miles and emptying its waters into the north side of the Bay. The west boundary of the Province of Nova Scotia is marked by a due North line from the mouth of that river to the river Saint Lawrence, and the line being extended to the river last mentioned must have been a line known and contemplated as the boundary of Nova Scotia, before the conquest of Canada. The Scoudiac is marked as being on the west corner of Passamaquody-bay, but the river placed on the Map as the boundary, from its situation, its course, its parallel with the Penobscott, the fork which comes from the Eutopia Lake, and the situation of Deer Island from it, all bear uncontrovertible testimony that the Magaquadavie is the river therein set forth as the Saint Croix and as the Western boundary of Nova Scotia.

- 83 There is another sheet in the same collection which is called a New and Correct map of North America, collected from the original materials of Governor Pownall and others and published in 1777.

The bay now known by the name of Passamaquody is there called by that name. The Cobscook is called the Saint Croix, and a line drawn due north from its mouth in green colours is marked as the West line of the Province of Nova-Scotia. The North branch of the Scoudiac is there called the Passamacodie river, and the south Branch coming from near the Penobscot has no name given to it in that map, but the Magaquadavie is there denominated the *old Saint Croix*.

In another sheet, said to be "A Map of North America from the French map of M^r D'Anville improved with surveys made since the Peace"—on that map is a memorandum in these words: "NB. The boundaries of the Provinces since the conquest of Canada are laid down as settled by the King in Council"—Deer Island and Grand Menan are seen in their natural order. The Cobscook has no name



From A New and Correct Map of North America . . . Corrected from the original
Materials of Governor Pownall, 1777.

(In Jefferys' *American Atlas*. London, 1776.)

given to it, nor does the Magaquadavie bear a name on the plan. The north branch of the Scoodiac is called the Saint Croix, but a line marked on the Penobscott and from that river, to the head of the Ristegouche, a river rising on the highlands and running into the bay of Chaleurs, is marked for some boundary or other.

On another sheet in that work, being a Map by Samuel Dunn, Mathematician, the Magaquadavie was called the Saint Croix, and a North line is marked from the mouth of it to the highlands as the Provincial boundary of Nova Scotia, and meets the head of the river Ristegouche at its source. Passamaquody bay is there designated by its proper name, and the place represented as the influx of the river into the bay, and the mark or place of the Scoodiac there given leave the fact unequivocal, that the Magaquadavie is the river there intended. The place where it intersects the Saint Johns river would be conclusive, if the other circumstances did not exclude every cause of controversy.

There is another sheet called a New Map of Nova Scotia by 88¹ Thomas Jefferys, Geographer to the King. In this map the Cobskook is not mentioned, but there appears to be an inlet or arm of the sea where that river should be placed. The place of it is known by the situation of the Islands which are accurately designated. The South branch of the Scoudiac is not regarded in that map, but the north branch is stated as on a course parallel with the Magaquadavie marked as the boundary and called Passamacodie, or Saint Croix, and the Magaquadavie is called Saint Croix.

Upon these maps which are produced a few observations have become necessary.

It appears from all the Ancient maps—that the river now contended for by the United States was denominated the river Saint Croix, and that no other river was known by that name on any map published either by the French or English geographers, or voyagers, before the year 1776.

That in the map compiled by Jefferys,—called the American Atlas, in the sheet first mentioned, taken from the surveys of Holland, Evans and others—that river is marked as the boundary between the Nova Scotia and the New England Provinces.

If this map had been before the Commissioners at Paris, who compiled the Treaty of Peace, they would have been led by this circumstance to have concluded on that river as a boundary, if an English Map of that date could have influenced their conduct.

¹ The original page numbers from this place to 90 are given as they are found in the record, but they are not in regular order.—EDITOR.

They must have known it to have been the representation of an acknowledged boundary, before the Government of Lower Canada was settled by an English proclamation.

89 Another concession is on the map of Thomas Dunn. The Magaquadavie is there marked as the boundary, and the line of boundary drawn from its mouth to the highlands. Under the appearance of these facts, any impartial man would be struck with astonishment, when he hears the Agent for His Majesty in such confident, and apparently triumphing strains, dwell on the idea of the ancient Saint Croix, the Saint Croix of L'Escarbot, of Champlain, the Saint Croix preëminently so called, &c.

Against all this we have in these maps one sheet, taken from the Chart of D'Anville, wherein he calls the North branch of the Scoodiac the Saint Croix, takes no notice of the South branch of that river, but makes the Penobscot the boundary between Nova Scotia and Massachusetts. We do not know when the Map of D'Anville was made, but we may reasonably conclude that it was adopted when the English, a few years before the revolution, claimed to hold the territory between Nova Scotia and Penobscot as not completely granted by the Charter of the Province of Massachusetts, and that the line there marked was intended by the English geographer not [as] the line of Nova Scotia, but as the line of an intended new province. The boundaries are said on that map by the English Geographer to be settled by the King in Council. Certainly the line of Nova Scotia was never by that authority extended to the Penobscot, and we must therefore conclude that it was the designation of a New Province theretofore in contemplation, of which divers people were expecting to be made Governors, and the East side line whereof was to have been on the Saint Croix river. The Scoodiac might have been considered under this idea as a sweetener to the Nova-Scotia party, and as very well for the other side. Under this idea the Grant to Governor Bernard and to others of lands on the West side of Passamaquody bay, was made on an expectation of security from the Province which was then in a state of process, and expectation.

84 In the map which Jefferys made of Nova Scotia he has given the North branch of the Scoodiac the name of the Passamacodie or Saint Croix. And yet we hear the most confident assertions that there never had been a river of the name of the Passamacodie. And though this geographer to His Britannic Majesty expressly denominates the river, called by the Indians the Magaquadavie, the Saint Croix, yet it is by the same power now asserted in the highest confidence, that the name of the Saint Croix as applied to that stream is



From A Map of the British Empire in North America. By SAMUEL DUNN.
(In Jefferys' American Atlas. London, 1776.)

quite a novel sound, and never heard of as used in that way before the present controversy.

The Agent for the United States can only say that he feels himself, his Nation's interest and his controversy, as very safe in the hands of Commissioners who know very well how to distinguish between strong assertions of the parties, and the evidence offered in the Cause.

One of the Charts already spoken of exhibits the Cobscook as the river Saint Croix. This map was no doubt intended, as has been before suggested to countenance the Grants—made to Bernard and others. That one which made the north branch of the Scoodiac the Passamacodie or Saint Croix, and the Penobscot the line of Massachusetts, was done in regard to the then Province, contemplated before the Revolution, which has been already spoken of.

The Scoodiac, that river, the appearance of which, so fair, so supereminently spacious and beautiful, so well described by De Monts, L'Escarbot, Champlain and De Laet, with its Islands—memorable for their reception of and hospitality to the first European Voyagers, was in all this time, in those ages of adventures, and controversy never once thought of, spoken of, marked, or noted as the river S^t Croix. What a strange deception and unaccountable blindness had the World been under for a Century and an half.

In the year 1775 a parliament of the English nation was in session. 85
It had begun its existence in 1774. The conduct of the New England Colonies was such as induced the British government to place their Commerce under particular restrictions. *Act of Parliament, 1775*
An act was accordingly passed, providing that no foreign, or English Goods, should be landed in any port within them, from any other than British bottoms. Goods which were found to be in a situation contravening this Act, were to be seized to the use of His Majesty.

If the boundaries of the Province of Massachusetts had been then well and perfectly defined, there could have been no necessity for creating new, or of declaring of old boundaries. The Ministry it seems in casting their eyes from one map to another, in considering first one part and then another, were confused in their ideas, and wished for some method by which a boundary to the Eastern side of [the] then New England refractory Provinces might be ascertained. The law intended to be enforced was highly penal, and though the trial was to be had in a Court, entirely devoted to the Administration of the Government, yet the habits necessarily contracted under the British Constitution, and a decent respect to the opinions of a Nation divided in sentiment respecting the treatment of their Colonies,

rendered it necessary that no traits of uncertainty should be found in the Act. But when the complaints of the Colonies were multiplied, and a civil war had been actually commenced, it would have been the height of imprudence to have aggravated the supposed injuries by an Act of Parliament infringing on the Charter of one of the most respectable and most interested Provinces, in regard to its territorial qualified property, and to its jurisdiction in civil matters. The infringements upon Charter privileges by Parliamentary proceedings, and orders of the King in Council, hold a conspicuous place in the American list of Grievances.

- 86 The Government there was too wise, and too cautious to swell the catalogue where there was not an absolute necessity for doing it. All the purposes of a restrictive navigation might be answered without originating a new complaint. The ministry therefore managed the business with wisdom, by providing in the Act that, considering the bounds of Massachusetts as not settled or defined, the river coming into Saint Andrews or Passamaquoddy bay on the West side thereof should be considered *for the purposes in that Act only* as the boundary of that Province.

This Act has been treated of before and a repetition of the argument would be rather tedious than useful.

Upon this Act having been thus and for these purposes passed, the compilers of the American Neptune, from the surveys of Holland, Wright and others, under the direction of the Lords of the Admiralty in the year 1777, denied the Cobscook the appellation of the Saint Croix. The Magaquadavie is laid down without a name and the Scoodiac *for the first time* is saluted with the name of the Saint Croix.

The American Colonies and Provinces had then declared themselves Independent. The overtures of the Earl of Carlisle, Lord Howe and M^r Eden had been rejected, and if a hope remained of regaining the Colonies it was a very faint one indeed. There was then every inducement to urge the Geographers of His Majesty to carry the Province of Nova Scotia as far Westward as there was any pretention for it, and the Act of Parliament gave them a colourable pretence to fix the Scoodiac as the boundary. Considering that the Saint Croix had ever been a nominal and acknowledged boundary, it became necessary to give this river that appellation.

This matter was well understood by the Commissioners who made the Treaty of Peace, and therefore whilst those on the part of Great Britain urged the rivers of Kennebeck and Penobscot as suitable boundaries, the former because it had been called the Saint Croix and the latter because it had in one map been marked as the Eastern

boundary of Massachusetts, they had not the confidence to urge the Scoudiac as the river which had never by either party been considered, acknowledged or even thought of as the true Saint Croix. 87

As soon as the country was relieved from the horrors of a Savage war in 1763, the Government of Massachusetts began to assert its right. There was nothing done on either side until after the Charter of 1691. There was a conquest of the Country in 1690, a cession of it in 1697 to the French, and a reconquest in 1710, but in all this time, and until the peace of 1763, the country back was under the power of the Savages, and indeed was the habitation of Frenchmen down to the sea shore, until the neutral French were removed after the year 1750. 90

Assertions of
right by
Massachusetts

In the year 1762 M^r Bollan, being the Agent for the Province, states a difficulty in regard to the opinion given in 1732 by the Attorney and Solicitor General, and appears to be under apprehensions that the land between Penobscot and Saint Croix may be considered as not the Property of the Province, on account of the cessions and treaties which it had been under, but no question was ever settled upon it. His Letter is before the Board.

In the year 1764 Governor Bernard issued his orders to John Mitchel and his company to survey the Eastern boundary of the Province, and described the river which he considered under the name of the Saint Croix as a part of the boundary. 91

Instructions to
Mitchel for sur-
vey of eastern
boundary

The Agent for his Majesty insists that these orders were for surveying the Scoudiac as the river Saint Croix; but an attention to the orders discovers his mistake.

You are to embark in the sloop with a party of men under the command of M^r Nathan Jones, together with Captain Fletcher who is to be taken in at Pemaquid, and proceed to the bay and river of Saint Croix *or* ^a Passamaquody, and make an encampment there on some convenient place. You are then to proceed to survey the coast between the river *Saint Croix* and *Passamequodie* and eight miles up *each* of *said* rivers, on the shores next to each other marking the opposite shores by estimate from view. You are next to survey the coast from the mouth of the river of Passamequody taking Trigonometrical measure from certain points on the East side of the river across the mouth of it, to connect the two surveys together to the extreme point of the Bay on the West side. And if the river Passamequody is very large at the mouth you must survey up the river upon the West side of it untill the stream grows so narrow that you can measure a line across it by Trigonometry.

^a The word *or*, here is not exegetical but the orders are to proceed to either of two rivers as circumstances might render convenient.

You are also to survey the Island of Passamequody, and connect it to the Continent by Trigonometry. You are also to take the bearings of the other Islands by Trigonometry, so as to ascertain their places. In the like manner you are to survey the East side of the bay, from the extreme point, unto the mouth of Saint Croix river, connecting it with the first survey of [by] a trigonometrical line across the river as before. And in this survey to be very careful to ascertain by trigonometrical observations, the place of the Island of Passamaquody, and its least distance from the Eastern shore of the bay.

When this is done you are to proceed up the River Saint Croix, for which purpose Captain Fletcher will engage Indians with Canoes to Assist, and when you get above the point to which you have actually surveyed you must proceed to survey the river by calculating and sighting as well as you can according to a method hereafter mentioned when you get to the head of the river you will find a pond which you must delineate as exactly as you can, and particularly find out the most northern point of it so as to set it down in your plan.

- 92 When this is done, one of you, (or both if you please) with a party assisted by Indians with their Canoes, must cross by the usual portage from the pond into the river Madawamkee, which falls into the Penobscot, and will carry you all the way to Fort Pownall with the stream. This whole passage must also be surveyed by bearings, and calculations, according to the method following (but if there is not time, this last passage may be omitted). Upon the water, let a canoe go forward, while your canoe rests, and hoist a signal and stop:—then do you take a sight of the signal and its bearings,—and go to a [the] place, and note the time of your going by a Watch, and calculate the rate of your going by so many miles and furlongs an hour, as you with the opinion of your company shall judge. Let the signal boat go on, and you take bearing and follow as before. If you make several signal staffs, (which may be poles with a small white flag at the top) the signal canoes may keep going on, observing to fix a signal at every place which you take with you, and when the last signal is used the signal Canoe must stop till you
- 93 come up, and give her all the signals again. In like manner you are to do by the land, observing to make the length of the bearings as great as may be as in this manner of survey great dependence is had upon the Computation of distances, you should learn to measure distance by time by making some actual measure by water, and land and noting the time of passing with stream or against, in a good path or a bad one. You are to keep an exact Journal of all your transactions and of the particular work each party is employed in every day and when the two surveyors are separated each is to keep a Journal.

The obliteration [omission] in the first page is done with a view of not obstructing the general work; but if you can do that business in the evening, so as to lose no time it will be the better.

BOSTON 25th April 1764.

When the survey of the Passemaquody should be concluded he was to go on to the Saint Croix. He was to obtain Indians to carry his Canoes and to give him needed information. When he arrived at the head of the river he was with the assistance of the Indians to carry his canoes from the Pond which made the head of the river over to the Madanwankee, which falls into the Penobscot. Whether he could pass with facility by this route from the head of the Magaquadavie can be seen from the plans of actual survey. But if he could not, Bernard might then suppose it practicable, for he knew no more in regard to the Scoudiac than he did to the Magaquadavie Ponds.

The Agent for his Majesty has done the Author of the History of 94 the District of Maine the honor to quote him various times as an authority. Perhaps this respect could not have been paid to him, if it had not been for the character in which he appears in this trial. However this may savour of humour, yet his situation in this cause can neither add to [n]or diminish from the merit of that book. The plan prefixed to it is the work of the Printer, the author having no concern in that matter: and there need not be one moment spent, in order to convince the Board that it is in fact no representation of the Country. Indeed it could not be, for there had, when the book was published, been no actual survey or accurate map of the river Penobscot nor has there been one to this day. John Jones had then surveyed the Scoudiac river and Lakes for the English Government, but there was no map of his survey within the United States that the Author or printer knew of. Nor is his map a representation of the Country.

The Agent on the other side is too much of a Lawyer to take a confession in that book as binding upon the United States. But if he adopts a well known rule of Law to take the confession altogether, he is welcome to use the book as he pleases.

But to return to Mitchel's instructions.

95

When Mitchel should arrive at the head of the river, it was supposed that he would find a Pond, from which pond he was to pass into a branch of the Penobscot called the Madanwankee, but if there was not time, this passage was to be omitted. There could have been no occasion for this caution if the passage was from the Scoudiac Lakes to the Penobscot.

How far the Lakes of the Scoudiac are below this branch of the river will be seen on the maps returned by the authorized surveyors.

The Agent for the United States now offers before the Board the

said John Mitchel, Joseph Bradbury, Israel Jones Esq^r and Abraham Duncan, who all testify that under these Instructions they proceeded, and after examining the Native Indians under oath as to which was the Saint Croix river, and having heard them all testify that the Magaquadavie and no other river was the Saint Croix river, and having the same shewn to them by the Indians as that river, they proceeded to survey the same under those Instructions as the boundary. And the Journal or Field Book of Mitchel is here produced to shew that there is no fallacy or mistake in the business.

This is strongly corroborated by the Testimony of the Indians which has been taken by the Board, who have with one voice declared that the Magaquadavie and no other river was ever called the Saint Croix. Neither their proximity to the governments of Nova-Scotia and New Brunswick

96¹ [n]or dependence upon the people of these two Provinces could lead them from a fact which had been notoriously handed down from generation to generation by their Ancestors. The evidence now given by the natives is literally the same as was given by them to Alex^r Nichols Esq^r in 1760, to James Boyd Esq^r: in the year 1763, to John Mitchel, Nathan Jones and others in 1764, to Gen^l Brattle, Gov^r Bowdoin and M^r Hubbard in 1771, to Gen^l Lincoln and Gen^l Knox in 1784. When they made all their declarations, excepting the last, they could be under no possible influence from the province of Massachusetts, for that province had in fact no concern with them. After the commencement of the late war the Indians there were in amity with the Americans but were not hostile to Great-Britain; they are now in fact dependent altogether on that nation.

98² I the subscriber an inhabitant of Chester in the State of New Hampshire voluntarily make the following declaration, to wit.

Testimony of That I was employed by His Excellency Francis
surveyors: Depo- Bernard Esq^r Governor of the Province of Massa-
sition of Mitchel chusetts bay in April 1764, as a surveyor in com-
pany with M^r Israel Jones as my Deputy, M^r Nathan Jones as
Commanding Officer of a party of Troops, and Captain Fletcher as
Indian interpreter, to repair to the Bay of Passemaquady, to
assemble the Indians usually residing there, and from them to
ascertain the river known by the name of Saint Croix. We ac-
cordingly assembled upwards of forty of the principal Indians—
upon an Island then called L'Aterele—in the bay of Passamaquady,
after having fully and freely conversed with them on the subject of

¹ P. 97 is blank.

² P. 99 is blank.

our mission, the Chief commissioned three Indians to shew us the said river Saint Croix, which is situated nearly six miles North, and about three degrees East of harbour Le Tete, and East North East of the bay or river Schudac, and distant from it about nine miles upon a right line. The aforesaid three Indians after having shewn us the river and being duly informed of the nature and importance of an Oath did in the most solemn manner depose to the truth of their information respecting the identity of the said river Saint Croix and that it was the ancient and only river known among them by that name.

We proceeded conformably to this information in our surveys, and in August following I delivered to Governor Bernard three plans of the said river Saint Croix and the bay of Passamaquady.

JOHN MITCHEL
Surveyor.

An answer to the objections made by the Agent for His Majesty to the Deposition of M^r Mitchel, on account of his age and local situation, could not become necessary, if it was not that a due and proper respect ought to be paid to the character of the person by whom these objections are made. 100

M^r Mitchel, must have been considered as being a Gentleman of distinguished character, otherwise Governor Bernard would have never sent into another Province to demand his services in preference to those of any Gentlemen in his own government. The survey was made by him in 1764, and his deposition was taken nineteen years after, when he was by no means an old man. His deposition was taken *ex parte*—but it has been taken frequently; and each deposition is consistent with the others. There are marks of veracity in his testimony which are in themselves uncontrollable.

His deposition is compleately [*sic*] supported by those of Nathan Jones, Israel Jones, and Joseph Bradbury Esq^{rs} and M^r Abraham Duncan who were with him. If he does not tell the truth all these are false. James Boyd Esq^r supported them though he was not of the party, and John Frost gives the same account which is given by all these. Besides this the field book or Journal of M^r Mitchel is before the Board made at that time with all possible marks of authenticity upon it. A man must affect to be prejudiced and partial indeed, who can withstand this combination of circumstances, concentrating in the point of Mitchel's faithfulness. 101

I, Nathan Jones, of Gouldsbrough in the County of Lincoln and Commonwealth of Massachusetts Esq^r testify and say that in the Year Seventeen hundred and sixty four, I was employed by Sir Francis Bernard then Governor of the Province of Massachusetts-bay as Commander 102

Affidavit of
Nathan Jones

of a party employed to explore the woods and view the rivers and bays particularly that of Passamaquoddi in the Eastern parts of said Province, and to ascertain the river Saint Croix, dividing the said Province from the Government of Nova Scotia, and to perform a survey thereof. Accordingly we proceeded and assembled upwards of forty of the Indians on an Island called Le Tete and after having fully and freely conversed with them upon the subject of our mission, the Chief commissioned three Indians to shew us the said river Saint Croix, which is situated nearly six miles North, and about three degrees East of the harbour Le Tete, and East North East of the bay or river Scudac and distant from it about nine miles upon a right line. . . . The aforesaid three Indians after having shewn us the said river, and being duly informed of the nature and importance of an oath—did make solemn Oath to the truth of their information respecting the Identity of the said river Saint Croix—and that it was the river known amongst them by that name, which river is the Eastern river in the Bay of Passamaquoddi, and now known by the name of the Magacadava. We proceeded according to the information in our surveys and agreeable thereto in August following made return of our doings to the said Governor Bernard.

NATHAN JONES.

- 103¹ SUFFOLK SS BOSTON *March 17 1785.* The above named Nathan Jones personally appeared and on oath declared that the above by him subscribed is true.

Before me

EZEK¹ PRICE *Justice Peace*

- 106 I Abraham Duncan of London Derry in the State of New Hampshire testify that in April 1764, I was employed by Governor Bernard then the Governor of Massachusetts-bay with John Mitchel, Israel Jones, and others to survey the river Saint Croix, as the Eastern boundary of that Province; and proceeded according to a Journal which I now have before me. At Pesmaquada we took in Captain Fletcher as an Indian interpreter on the 14th of May and then proceeded to Bagaduce. We arrived at the Island L'Aterecle² on the 25th of May. We proceeded from thence with four Indians on the 5th of June for Saint Croix. Capt. Fletcher went as Interpreter. We went from the Island in the morning at 6 oClock and got to the opening of the river about 11 oClock that same day in a Whale boat, the Indians in a Canoe. Fletcher then swore the Indians to the Identity of the river: we then refreshed ourselves and proceeded to the falls which I suppose are about three or four miles from the opening or mouth of the river; the falls are very steep. M^r Mitchel surveyed Westward on the sea coast from Saint Croix river to Point Leine where there appeared to have been

Affidavit of
Abraham Duncan

¹ Pp. 104 and 105 are blank.

² So in the text, although it is afterwards spelled "L'Atereele."—EDITOR.

an ancient settlement and burying place, where Crosses were on the Graves. We began our survey from Saint Croix on the 6th of June, and came to the Pesmaquoda on the 9th. We went from thence to point Leine and got breakfast, and then went to the Island of L'Atereelee, where we arrived at about 8 oClock. I recollect perfectly that the Indians said that the river they shewed us the Saint Croix, was the only river in that Country which they knew by that name, as Fletcher the Interpreter then interpreted what they said to us

ABRAHAM DUNCAN

United States.

State of New Hampshire.
Rockingham County

July the 3rd 1796

Then the above-named Abraham Duncan being a person of good reputation and well known to me, appeared before me the undersigned, one of the Justices of the Peace for the said County of Rockingham, and subscribed and made oath to the above deposition, the same being taken at the request of James Sullivan Esq^r Agent for the United States to be used before the Commissioners for the Ascertaining what river is intended in the Treaty of 1783 between His Britannic Majesty and the United States, as the river Saint Croix

107

Before

ISAAC THORN *Jus: Pacis*

State of New Hampshire

I Joseph Pearson Secretary of the State abovesaid, do hereby certify that Isaac Thorn Esq^r of London Derry was duly appointed on the sixth day of January, One Thousand seven hundred and ninety two, a Justice of the Peace for the County of Rockingham in said state for the term of five years from that date, and Commissioned accordingly. That he is duly authorized to administer oaths and take affidavits and that full faith and Credit is to be given to his certificates and attestations, in and out of Court.

Given under my hand this ninth day of August One thousand seven hundred and ninety six, and of the American Independence the Twenty first.

JOSEPH PEARSON

State of New Hampshire.

[Seal] His Excellency John Taylor Gilman Esquire,
Governor of said State.

To all to whom these Presents shall come

It is hereby certified that Joseph Pearson whose name is signed to the foregoing Certificate is duly appointed Secretary of said State and that full faith and Credit is due to his official Acts.

In testimony whereof I have caused the seal of said State to be

affixed; and have here unto set my hand this ninth day of August in the Year of our Lord 1796 and of the Independence of the United States of America the Twenty first.

J. T. GILMAN.

By His Excellency's Command
Nath^l PARKER *Dep^y Sec^y*

108 I the subscriber an inhabitant of Adams in the State of Massachusetts, voluntarily make the following declaration, to wit, that I was employed as Deputy to John Mitchell Esq^r Declaration of surveyor who appointed by Francis Bernard Esq^r Israel Jones Governor of the Province of Massachusetts bay to repair to the bay of Passamaquoddy to assemble the Indians usually residing there, and from them to ascertain the river known by the name of St^e Croix, went thither in Company with me the Subscriber, Colonel Nathan Jones as Commanding Officer of a party of troops, and Captain Fletcher as Indian Interpreter. The principal Indians were assembled upon an Island called L'Atereele, in the said bay of Passamaquoddy, after having fully and freely conversed with them upon the subject of our mission, the chief sent a number of Indians to shew us the said river Saint Croix which is situated nearly six miles North and Easterly of harbour Le Tete, and nearly East north East of the bay or river Scuduc and distant from it about nine miles upon a right line. The aforesaid Indians after having shewn us the river and being fully informed of the nature and importance of an Oath, did in a solemn manner depose to the truth of their information respecting the identity of the said river Saint Croix, and that it was the ancient and only river known amongst them by that name. We proceeded conformably to this information in our surveys, and in August following plans of the said river Saint Croix, and the said bay of Passamaquoddy were delivered to Governor Bernard.

109¹ I further say that I know of no other river than that aforesaid as the river Saint Croix and which the said Indians shew me as the only river by the name of Saint Croix in Passamaquoddy-bay that they knew as such, which river I explored to its source, and there found a pond mentioned in my Instructions from Governor Bernard which agreeable to those Instructions we then and there delineated according to our best means and judgment.

ISRAEL JONES

112 SUFFOLK SS BOSTON 23rd February 1790.

Personally appeared Israel Jones Esquire and made oath to the truth of the foregoing deposition by him subscribed taken at the request of James Boyd Esq^r *in perpetuam memoriam*.

Before us

SAMUEL BARRETT { *Justices of the Peace,*
ISRAEL KEITH { *Quorum Unus*

¹ Pp. 110 and 111 are blank.

I James Boyd testify that in May 1763 I went to Passamaquoddy-bay to settle, and there made from time to time a Journal, which I have now by me and which is as follows.

Deposition and
journal of
James Boyd

Passamaquada May 1763. Arrived on an Island *Jeganagoose* so called, by the natives, or Indian Island. After I built a Store, I set out with a whale boat and explored every Island in the bay and when I met with any of the Natives, I got from them what name they were called by the natives. Went up a river after entering the Grand bay by the harbour *Le Tete* which the natives named *Magegadewee*. Stopped at the carrying place—returned to the bay and viewed *Dicteguash* river, then *Boquabeck* and *Chamkook*, in my way *Conasquamkook*, now Saint Andrews. Left the last point, went up the bay and found *Wachweig*. Crossed and went up *Schooduck* on my return. Stopped at *Conasquamkook* and there took on board of my Whale boat a small piece of Ordinance and arrived at *Jeganagoose* &c &c. Went to an Island on the North East side of the Bay, which Island had been settled a considerable time before by the subjects of France—a good point of the Island and the marks of a breastworks or entrenchment in the harbour at high water. This Island appears surrounded by Islands. At lowwater you can go from some of them to others. Went up to *Cobskook*, there found a small river. At my return the most of the natives had arrived at *Jeganagoose*. After conversing with them and got the names of all the Islands and rivers in *Passamaquaday*, the harbour *Le Tang*, and harbour *Le Tete* and found wherever the Natives had buried they erected a cross, either on Islands or on the main land.

In 1764 John Mitchel Esq^r arrived in this place to survey 113 *Passamaquada*. Mr Jones asked my leave to store his provisions, and that I would call the Indians together, that he had Governor Bernard's orders to assemble all of them. I did as he asked me. They met by my Store. I was present and heard Jones's Commission read. The Interpreter spoke to the Indians and interpreted the whole. Captain Jones desired the interpretation [sic] to ask the Indians if they knew of a river by the name of *Saint Croix*? They answered *Yes*. Would they shew it to the surveyors, *Yes*. Where do you say it is, they answered near by harbour *Le Tete*. They appointed a day, and I was appointed Interpreter. The day appointed came. Capt^r Jones hired a Whale boat of me. We left *Jeganagoose* and arrived at harbour *Le Tete*, found *Bungawarrawit* (the Governor) ready with the other Indians. We left this and arrived at the river and after the Interpreter asked the Indians, if this was the river known to them, by the name of *Saint Croix* they said *Yes*. He asked them if they knew the nature of an Oath. They answered *Yes*. That they had sworn to serve the King of France, and should declare the Truth, as they did and the Interpreter took their Oaths. It was reported there, that, at the time

Col^o Church took the French, which were settled in Passamaquoddy, he threw up two Breastworks,—one on *Pleasant Point*, the other on *Conasquamkook* and then went out and reduced *Annapolis* on the North East side of the Bay of Fundy. Some time before Quebec was taken from the French, Capt. Hector McNeil was taken prisoner in the Harbour *Le Tang*. It was Indians which took him. One Frenchman who married an Indian, was with the Indians. They gave Capt. McNeil the Names of sundry places. The Indians carried Capt. McNeil's Vessel to *Conasquamkook*, and then unloaded a good deal of his Cargo. McNeil had some small guns and swivels. The Indians kept [left] one gun to give alarm when needed. The Indians then carried the Vessel to Saint Johns River, and carried their Captives up the river to *Quebeck*. All the facts above related I declare to be true.

114

Questions put to James Boyd Esq^r by the Agent for the United States.

1. Were there any white Inhabitants on the Shores or Islands of Passamaquoddy Bay when you went there in 1763?

Answer. None only the Natives. The nearest white Inhabitants were at St. Johns or Machias.

2. Were there any appearances of former habitations on the shores and Islands of said bay—What were the appearances and where were they said to be made?

Answer. There were Indian bark huts, but no framed house, or marks of any French or English house.

3. What people were then reported by the Indians and others to have lived there—how long had they been removed—and was it reported who had removed them?

Answer. There have been no inhabitants on these shores or Islands since the descent of Col^o Church—as I have always been told by the Indians.

4. Did John Currie go there with you—or when did he arrive there?

Answer. He did not go with me, but he came there in the year 1770.

5. Was there a civil jurisdiction exercised by the Government of Nova Scotia over the People there—when did it begin and how far west did it extend?

Answer. The Jurisdiction began at Saint Johns River but how far West it extended, I am unable to say further than will appear from a Commission which I received as a Justice of the Peace for the County of Sunbury and District adjoining westward, and which I believe was the first civil commission issued for that quarter of the Country, a copy of which commission is annexed.

6. What was the name of what is now called Saint Andrews point, when you went there?

Answer. Conasquankook.

7. Did you ever know Alexander Hodges, who he is, and when did he come to Passamaquoddy?

Answer. I knew him. He first came to Passamaquada as a 115
servant, to a certain M^r John Frost of Machias an Indian Trader.
He was very illiterate.

8. Did you know an Indian by the name of Louis Neptune, and
did you ever hear him swear or say which was the river Saint
Croix?

Answer. I did; but to give a more full answer to this question it
is necessary to state that I knew several Indians of the name of
Louis Neptune, this is a name which was very common among the
Indians at Penobscot, Passamaquady and Saint Johns, but the
Louis Neptune which I refer to was of the Passamaquady tribe, and
who was one of the persons appointed by his Father Bungawara-
wit, or John Neptune (then Governor of that tribe) to go with
Jones and Mitchel and point out to them which was the true river
called Saint Croix, and which the said Louis Neptune did then and
there, standing on a point of Land of the North side of the Maga-
quadavie in concurrence with two other Indians declare the
Magaquadavie to be the same river, known among the Indians by
the name of Saint Croix. And further to distinguish and identify
the said Louis Neptune, he was called by the Indians *Racksuces*
which means *a man of great strength*—or *having the strength of a*
Bear.

There is no necessity in this Argument to be more particular on the 116
testimony of those witnesses. The Board have the whole and must
be convinced that there is no mistake in the relation of John Mitchel
and his party.

The Agent for His Majesty has seen fit to say that Governor Bern-
ard disapproved of this whole business, and never had the return of
the surveyors recorded. Mitchel swears that they began their
survey in April 1764, and that in August following he delivered
Governor Bernard three plans of the said river Saint Croix (clearly
meaning the Eastern river) and of the Bay of Passamaquody.

The true reason why this procedure and these plans were never
made a matter of record by Governor Bernard is given by the Agent
for His Majesty in page 108.¹ That in October 1765
a grant was made to him by the Governor of Nova ^{Grant to Governor}
Scotia of one hundred thousand Acres, on the West ^{Bernard}
side of Passamaquody Bay including what is now Moose Island, and
there is no doubt but that a communication was opened and an under-
standing formed between him and the Governor of Nova Scotia im-
mediately on the Appearance of Mitchel, and his party in the Bay,
and that the Grant made in the next year was then stipulated for.

Bernard in receiving this grant, paid no more deference to the 117
Scoodiac and Cobscook, than he did to the Magaquadavie, for his

¹Supra, 238.

Grant was to the Westward of all those rivers. In the year 1762, as M^r Bollan the Provincial Agent states in his letter now on the Table, the Crown had it in contemplation again to claim the land as far West as the River Penobscot. Bernard knew enough of plantation proceedings to feel assured that he could gain something handsome from this plan. When he began to ascertain a line East of that River, upon what might be considered the common received line of North Virginia and the Duke of York's Patent, and the Province of Massachusetts, a communication was opened on the other side, and One hundred thousand Acres were granted. This territory was fully extensive enough to perform the funeral obsequies of Mitchel's return, and of his three maps in.

The honorable Board will be pleased to recollect the Commission of Governor Hutchinson to the late Governor Bowdoin, General Brattle and M^r Hubbard for investigating the line and the return of that respectable Committee in 1770, and that the Magaquadavie so called by the Natives, was the Saint Croix.

The claims made immediately after the peace of 1783 and even before the definitive Treaty was signed, are referred to by the Agent for the United States in his first Argument, and now proved by the testimony of John Allan, and by various documents on the Table. This leads us to an examination of the Acts of possession, and the exercise of Jurisdiction over the Territory in controversy, as done or had by the Government of Nova Scotia or that of Great Britain.

118 British acts of
possession and
jurisdiction

The grant of 1765 to Perkins of Passamequodie Island, is the first that has been mentioned, and no doubt was one of those designated, in that part of the Treaty of 1783, which saves all the Islands that had been under the Jurisdiction of Nova Scotia. No other grants but of the Islands, excepting the extraordinary one to Bernard, appear to have been made before the year 1767.

Whether these grants were made under an Idea that the whole Country as far as Penobscot was the property of the Crown, or on what account they were made, we cannot now ascertain.^a There is one principle which must hold good in all cases, that is that the act of one of the parties has no other efficacy than what arises from a claim only, unless a length of possession ripens it into a right.

It is said that there is evidence of the Inhabitants in that part of the Country having prior to the revolution submitted themselves to

^a The Commissioners will be pleased to attend to Governor Hutchinson's Account of this matter in his second Volume page 379 which shews what the ideas were in the year 1730 on this point.

the government of Nova Scotia. There is no necessity for evidence on this point. That the Crown on the principles mentioned in the letter of Agent Bollan, which has already been read, intended to limit the Massachusetts Province to the river Penobscot, and finally to 119 make a new Province between that and Nova Scotia is agreed. [It is also agreed] that people as far west as Machias, being out of the reach of the Laws of Massachusetts and finding themselves equally unable to resist the claims of Nova Scotia, made with the intentions above expressed, and the difficulties resulting from having no government, did submit to the precepts of Nova Scotia, and held a Court probably on the Island of Campo Bello.

But this exercise of Jurisdiction or these Acts of claim and possession are so far from affording proof that the Province of Nova Scotia, or the English government at that time claimed the Scoodiac as the river Saint Croix, and as the Western boundary of that Province, that it evidently and conclusively shews that when these Grants were made and this Jurisdiction was raised they had no idea of that river being the boundary of Nova Scotia.

Our next attention is to the famous Act of Parliament, so frequently mentioned and so much relied upon.

It hath heretofore been hinted that *that* Instrument should be viewed in two points of light, in order to give it a full and free examination.

Further consideration of
Acts of Parliament

The first is the intent of the Act itself, and the second the force and efficacy of it, let its intent be what it might.

As to the first it speaks for itself.

120

It was a penal Act as is observed on the other side, and was intended to destroy the Navigation of Provinces and Colonies, which had entered into Acts and associations for non-importation of British goods. In order to render the Penalty certain, it was found to be necessary to ascertain the doubtful boundary of one of the Provinces: and that there should remain no doubt in this respect, it is enacted and declared, that the river which empties its waters into the West side of Passamequody bay shall be deemed the boundary of the Province, for the purposes in that act mentioned and Intended. It has been before observed, that if this boundary was so notorious there could be no need of creating it *de novo*, for this purpose, and this purpose only.

But secondly, if it was created as a boundary by that Act for every purpose, it is contended that the Parliament had no constitutional Authority to do it. The Agent for the United States has as great respect for legislative authority as any man. Perhaps he has not an

obsequious regard to a Parliament which hath no control over him; but he has yet some idea of what the English Constitution is and is clearly of opinion, that where by Letters Patent, the Crown had granted the soil, and created a jurisdiction over it, there the Parliament could by no means interpose their authority to take away either.

- 121 No instance is offered in support of the position of His Majesty's Agent, excepting the Act of Parliament for creating the Province of Quebec; but it has been already shewn that Nova Scotia had no certain known boundary, that it was Crown lands and public property (a) and it is known that Canada was then a *conquered Country*.¹ All the constructions given to the former Charters by James and his unfortunate posterity, shew that these Charters could not be interfered with, unless it was by process in chancery, or by the Voluntary surrender of the Patentees.

One instance might be given of an attempt to increase such an authority, in what is now the Southern parts of the United States, but this was remonstrated against by Congress in their declaration of grievances, before the declaration of Independence, and made a part of the declaration also.

The use intended to be made of this act by the Agent for his Majesty is that it being before the Commissioners, who made the peace, or at least known to them, they must have taken it for their guide, or have been influenced by it. This is clearly hedging the question, for there is no proof before the Board that it was spoken of or seen by any of the Commissioners or ever known of by those who acted on the part of America. If the fact is as the other side supposes it to be the proof is within their reach. There can be no necessity for conjectures on the point.

- 122 But there is clear proof that the Act of Parliament had no share in the matter. If it was a governing principle why did the Treaty mention the Saint Croix at all? The Act of Parliament describes a river without a name, emptying its waters into the bay of Passamaquoddy on the West side thereof. If the Treaty intended the same river, why did it not give it the same description? Or if it contemplated that river as the Saint Croix because it had been made a boundary in an Act of Parliament for a special purpose, why did it not describe it as a river mentioned in an act of Parliament of 1774 or rather 1775, and say it was the same as the Saint Croix river?

¹ The footnote designated above by "(a)" is omitted on the page from which this copy is made. Only the "(a)" appears in the margin opposite the line in which the reference is found.—EDITOR.

It is very clear that the Treaty left the parties to the true boundary which had been imagined or conceived from the recession of Massachusetts to the Banks of the Saint Croix, and the Duke of York's East line in the year 1703; and that the Commissioners had no line recently established or described or proposed by the mother Country, or by the Province, in their view, when they framed the second article in the Treaty of Peace.

We return to the question upon the evidence, what river was by the treaty truly meant and intended as the river Saint Croix therein mentioned. 142¹

In considering this question and in answer to the reply of His Britannic Majesty's Agent, it is proposed to adopt this mode of discussion. To consider

Questions to be considered in determining the true St. Croix

First: Whether the evidence offered by the agent for His Majesty is sufficient to prove that the Scoodiac river was a stream which was originally, on the first possession of the Country by De Monts in 1604, called the river Saint Croix.

Secondly

Whether it is proved by the evidence offered that the waters now denominated the Scoodiac river were by ancient Charters, Deeds and Treaties contemplated as the river Saint Croix.

Thirdly

Whether if all the ancient grants, charters, and treaties meant and intended by the river S^t Croix the river Scoodiac, it will from thence follow, on the evidence before the board, that the same river was truly meant and intended by the Treaty of 1782 as a part of the boundary therein given, and 143

Fourthly

Whether there is not full and irresistible evidence in the cause, that the river called by the native Indians the Magaguadavie is the river truly meant and intended as the river S^t Croix mentioned in the treaty of 1782.

Under the first head it will be natural to consider, first whether there is a description by L'Escarbot and Champlain of the Scoodiac, as the river known by the name of the Saint Croix.

L'Escarbot is the most ancient Historian whose writings respect this part of the American Continent; the Agent on the other side has stated him at large and appears to rely much on his descriptions.

Descriptions by L'Escarbot and Champlain

The Agent for the United States cannot discern in the writings of L'Escarbot any part sufficient to support the strong and confident 144

¹ By an error in the original paging, 122 is followed by 142.—EDITOR.

assertions which he has to encounter in this case. L'Escarbot says that leaving the river St Johns, they came following the coast twenty leagues from that place to a great river, which is properly sea, where they fortified themselves on a little Island seated in the midst of this river. The particular description of that Island and the effect it may have in the decision of the cause will be attended to in another place. He does not say that the river where the Island is was the first they went into, or that it was named *Saint Croix*. The mode of expression coasting along strongly intimates, that they were in other rivers.

There is a copy of a plan taken from L'Escarbot's history which was published in the year 1609 and which gives all the ideas that he meant to convey in his book, in regard to the appearance of that part
145 of the country. The copy of the Map is herein exhibited, and shews that the river emptying its waters into the Passamaquody-bay, on the north east side thereof, was at that time called the river Saint Croix. When we cast an Eye on the map we find no distinction in the form of the waters, between what is clearly the main ocean and the forks of the river there represented. Even the body of waters called the Bay of Fundy does not appear as distinguished in form from the Atlantic ocean. The Islands of Grand-Menan with ten other Islands, without and within it, are marked on the map, but there are only two Islands within what is intended as Moose Island; and those according to the scale of the Map are several miles below what are represented as the forks or branches of the waters. On the northeast side of this Body of waters were placed the words Saint Croix. Where these words appear there is a branch placed nearly where nature has fixed the Magaquadavie. If the author of the map by that Appellation intended to designate the whole of the Bay, or the river Scoodiac only, it would have been very extraordinary to have placed
146 the name in that position, but from its place we may suppose that he intended that river; more especially when it is considered as connected with the testimony of all the Indians as well as with that of other Witnesses. The Indians testify that the tradition is that the French people who first discovered the Country, went first into the Magaquadavie, erected a cross, and afterwards came into the Scoodiac, and there wintered on the two Islands called *Muttonaguis* and *Muttonaguamis* and that the river Magaquadavie, and no other river, has been since called the *Saint Croix*. This corresponds with L'Escarbot's own history of De Monts' *coasting along the Shore*; in which he gives the ideas of delays and searching for harbours; and we are obliged to conclude that they were many days on this coasting voy-

age, and yet the Island of Saint Croix is the only object of attention, according to the averments on the other side.

L'Escarbot had no idea of a legal, or political controversy, when he wrote his history of De Monts' voyage; and it appears from his map, and book, that a minute topographical description was no part of his design.^a 147

Had the writer intended an accurate description of that part of the Country, the Bay, the Islands, and the various branches of the rivers would have been exhibited in his map, and occupied a separate chapter in his work.

The Bay of Fundy, the river St Johns, and the river Penobscot, are by no means exhibited in such a manner as to compare, in any considerable degree, with the real appearance and situation of them in nature, or with other maps since produced. The Map of L'Escarbot appears to be intended to give a rough idea of three branches of the Passamaquoddy Bay, the Cobscook, the Scoodiac, and the Magaquadavie; and it will follow from this that the branch which was intended by a particular designation of the Saint Croix was then known by that appellation, and being then so marked the Magaquadavie or eastern branch was clearly the Saint Croix of L'Escarbot. In his history there is something said in regard to Bays and Islands which will be attended to presently. 148

Champlain gives a description of the river called the river of the Etchemins and in doing this he no doubt describes the river Scoodiac at the falls, and the two branches by one of which the Indian natives passed to the river Norumbeague or Penobscot and by the other to the river Saint Johns. These branches are beyond all doubt the Scoodiac Lakes and the Chaputnaticook. But that writer does not say that the river he describes was ever called the Saint Croix. He

^a The Agent for His Majesty has lately introduced a Map made by Senex, and dedicated to Her Majesty (perhaps Queen Anne). This Map has no mark of public approbation upon it, and is no doubt one of those which are spoken of in the notes on the Map authorized by the Lords of Trade in that reign as impositions on the publick. There never were more errors in a production of this kind than there is in that. Nova Scotia is laid down as far west as Penobscot and there meets the province of Maine which in fact went no farther east than the Kennebeck. The New-England Colonies, New-York &c, are altogether misrepresented; the Saint Croix is laid down in its proper course and place, and yet in such a manner as to afford no argument in the present question. There is an ancient Dutch Map compiled by Visscher which gives the Saint-Croix a course Parallel with the St John, and extending from the sea northward. There can be no proof collected from this Map excepting that there was supposed to be [a] river between the St John and Pentagoet called Saint-Croix. If on this map there are any appearances favourable to the English claim as to the mouth of the river, the course of the stream is entirely opposed to that claim. Another Dutch Map in a Book of Charts is offered by the United States in opposition to the appearances on the mouth of Visscher's map.

says this place (meaning the Island in the river described) was named by the Sieur De Monts the Island Saint Croix.

- 149 L'Escarbot says that the Island of the Frenchman's retreat was called Saint Croix. He goes on further in his fifth Chapter to speak of the same place as hard to be found, and calls it the Isle of S^t Croix. In the sixth chapter, the same author describes the buildings on the Island of Saint Croix.

In all the writings of L'Escarbot we do not any where find that he gives the name of Saint Croix to the Scoodiac. Champlain also mentions the Island as the Island of Saint Croix, situate in a great river, but does not call the river by that name. Champlain says that Islands, found in a certain river which was called the river of the Etchemins and which was no doubt within the Bay of Passamaquoddy or Saint Croix Bay, were called by De Monts the Island and the place of Saint Croix.

- 150 The Agent for his Majesty, p. 33¹ of his reply, expresses himself thus, with marks claiming attention, "and the third which is a great one going to the west which is the river Scoodiac or Saint Croix called by Champlain the river of the Etchemins." But neither Champlain [n]or L'Escarbot gave the river that name unless it is proved that the Island was in that river and that it must *necessarily follow* that, because the Island in the river was so denominated, the river itself must necessarily have the same name also. There is as necessary a connexion between the Indian names of the Islands and the name of the river, as between the French name of the same and of the river, and yet we do not find, that when the Islands are called Muttonaguis and Muttonaguamis, the name of the river has any affinity with theirs. There are innumerable instances, when the names of Islands in Bays, and rivers, have no connexion with the names of the waters by which they are insulated.

It would be troublesome to exhibit a list of such instances; every one who knows any thing of this, or any other Country indeed can recollect enough of them.

- 151 There being no instance in which the ancient Historians before-mentioned have given the name of the Saint Croix to the river Scoodiac, and the fact that the Islands in the Scoodiac were called the Saint Croix not being supported by evidence, or if supported being seen as insufficient to withstand the force of positive testimony, given by the Indians and others, as well as the irresistible evidence of maps, and documents, all concentrating in the point, that when the French people first came to the Bay of Passamaquaddy they entered the

¹ Supra, 187.

Magaquadavie and called that river the Saint Croix, the Agent for His Majesty has recourse to very recent transactions, and to the opinion of men who never saw the Country, or knew as little of it as he or the Agent for the States did before they were engaged in their several agencies.

The Agent for his Majesty says, in page 17¹ of his reply, that the Commissioners at Paris in 1754 stated a part of the Voyage of De Monts', and say, they came on, following the coast to the entrance of a river, when they settled on a small Island which they called Saint Croix, and that name was afterwards given to the river. This is quoted from the memoirs of the Commissioners, printed in London in 1755 and which are not in the possession of the Agent for the United States. He happens to have a copy of the memoirs of the Commissioners printed at Paris in 1757, in which he does not find this assertion. But suppose this to have been said by those Commissioners, what weight can it have in the Question, whether the Scoodiac or Magaquadavie was denominated the Saint Croix in the Year 1604? If the Commissioners at Paris in 1754, alleged this fact they must have done it from History, or conjecture; if from history, that History may now be produced. We have searched L'Escarbot and Champ-
lain, and do not find the fact in either. If it was from conjecture, that conjecture can have no influence here. Neither of these Commissioners, excepting Shirley, was ever in America, and he knew as little of the Geography of this part of the Country as he did of that of the Northwest part of the Continent. Their general ideas as to the situation of the rivers, the forms of Islands and the Geography of the territory for which they contended, are described in the map annexed to their memoirs and which is exhibited in this argument. 152

Discussions at
Paris in 1754

There is in the case an extract from a writer said to be one of great respectability as an author, who wrote in 1625. De Laet was never in America, and who ever reads him must be convinced that he attempted nothing in regard to this part of the Continent but to extract from L'Escarbot and Champlain; he gives a description of the Island De Margos and of the river Etchemins in the words of the latter.^a He recites their description of the Island where De Monts wintered, and says that above the Islands there is a bay into which three rivers empty themselves, the one from the East, the other from the North and the third from 154

Writings of
De Laet

¹Supra, 178.

^a L'Escarbot says "the people that be from Saint Johns River wherein are comprised the rivers S^t Croix and Norumbega are called Etchemins." Churchill's Voyages, 815.

the West, which is the river Des Etchemins, and two leagues up the river there is a great fall &c. Then he adds, to go from the river De S^t Croix to the river Pentagoet, or Norembegue you pass through a great number of Islands, rocks &c the Island Grand Menan &c.

Here it must be observed that this writer could have no accurate Idea of the Country of which he was writing, because he had never seen it, nor was there then in existence a map which exhibited a competent idea of that part of the Continent; the only writers of
 155 whom he could avail himself were L'Escarbot and Champlain: neither of which mentions the *Scoodiac* as a river by the name of Saint Croix.

It is however agreed that there was a river at that time in that Country known by that name, and if you take either of the rivers in the Passamaquoddy Bay, his description will answer the one river as well as the other. All that he says on the Subject serves only to shew that when you leave the river Saint Croix to go to Penobscot by the sea you pass by Grand Menan and a great number of other Islands in your course. Whether you come from the *Scoodiac*, the *Magaquadavie*, or the *Cobscook*, this must be the case: therefore his saying, that from the river de Saint Croix we pass to the Pentagoet is not saying any thing but what is as consistent with the *Magaquadavie's* being the Saint Croix, as it is with the *Scoodiac's* being that river.
 156 De Laet further says, that above the Islands which he describes there are three rivers, one from the east and one from the North, and a third from the West which came into a bay above the Islands. He says that the last is the river Etchemins but he does not call it the Saint Croix. From Champlain he takes his idea of three rivers, who says that there are three rivers of a middling size, and mentions their directions in the words expressed by L'Escarbot. We may enquire where those rivers are to be found above Saint Andrews point: There is no doubt but that Champlain was on the *Scoodiac*, as high as the first falls; it is possible to be true that he saw the mouth of the *Chaputnaticook*, and considered that and the waters issuing from the *Scoodiac Lakes* as two of his three branches, and if he did we do not know where he is to find his third river, unless we take the *Magaquadavie* for it.^a

^a Three branches of the waters are represented in L'Escarbot and Champlain's [maps], the first of which perhaps is the *Scoodiac* at the place called the Devil's head, and comes from the west, the next is of course the waters called Oak-Bay, the third cannot be the little brook called Wanweigh; this stream in order to make out the third river is magnified in the argument of His Majesty's Agent, and on the plans drawn by the interested artists of the province of New-Brunswick. But when the Commissioners cast their eye on the map from the authorized surveys it will be seen that there is no river there. The fact is that the plans are rough,

If it was ascertained beyond a doubt that the Islands called the Islands Saint Croix are the two Islands in the Scoodiac called the Muttonaguis and Muttonaguamis, we could not apply the description of these three Rivers to any waters in particular above those Islands; but they may all be naturally found by supposing the Islands called the Saint Croix to have been some of those Islands in the bay below Saint Andrews-point. That body of waters may be consider'd as a great river which is properly sea; and into the upper end of which, three rivers, one from the East, one from the North, and one from the West issue, and from the Easternmost, or from either of which, we pass by the Islands Grand Menan and others to go to Penobscott. 157

Those waters if called a river might also be called the river of the Etchemins, for all that Country was inhabited by a Nation of Savages who had that appellation. Champlain himself says that when he was at Penobscott, or Pentagoet, that this is also the Land of the Etchemins,^a and L'Escarbot, says that a Chief was sent from the River Saint Croix to meet with Armouchiquois who lived toward the Coast of Malabar as an ambassador from the Etchemins. 158

The transcript from De Laet can have no effect upon this Controversy, because he had no personal knowledge of the Country, and because he was obliged to rely altogether upon L'Escarbot, and Champlain, and could give no fact but what he had from them, and because he does by no means describe any river in particular as known by the name of the River Saint Croix.

There is another Circumstance in the writings of Champlain which may be improved, either to shew that his descriptions of the waters of the Country were very imperfect, or that he did not mean to call the Scoodiac the river Saint Croix. Speaking of the three rivers found near the Island where De Monts winter'd he says, and the third coming from the West it is that of the Etchemins. Champlain in his Voyage in describing the Country further West, according to the Observations made in his tour to Pentagoet, says, 159

I pass'd near a little river where Cabahis was, who came with us in our Skiff or Shallop twelve leagues, and having asked him from whence arose Norembegue he told me that it passed the falls, of which I have made mention above, and that going some way in the

incorrect, and quite inaccurate. To make the three rivers the Magaquadavie is necessary to them, and the figure of the country is as well represented on that idea, as on the one urged by the Agent on the other side.

^a There is a map in Champlain's voyages Ed. of 1613, as a map of New-France, in which the river St John is marked as the river of the *Etchemins*, which gives foundation to this expression used by him, "This is also the land of the Etchemins." Vide 1 Champlain, 112 &c. and Charlevoix.

river they enter a lake by which they go to the river Saint Croix, then a little by land they enter the river of the Etchemins. Near to the Lake there runs another river on which they go for some days, and they enter into another Lake and pass through the middle, when they have arrived at the end of it, they go some distance still by land, and after that enter into another little river, which goes into the river S^t Lawrence.

It is very plain that Champlain calls the western branch of the Scoodiac the river of the Etchemins (not the Saint Croix); that in the foregoing description of the river Pentagoet or Penobscot he
160 describes the falls, which are forty miles from the sea, at the head of the tide, and to which he had been in his Shallop; that the account given him by the Indian Cabahis, of the river above the falls, was of that branch which is called the Madawamkeag on which they might pass into a lake from which that branch of the river came, and that by going some way in that Lake they could come to the river Saint Croix, and that after they got to that river by going a little way by land they could enter the river of the Etchemins.

The first observation which calls our attention here is this, that the lake near the Passadumkeag, and which empties its waters through the Scoodiac, cannot be the lake spoken of, because the expression in Champlain is, going some way on or in this river we came to a Lake. Had he intended to convey the idea that from this river Penobscot, they passed overland or on a carrying place, to find
161 waters on which they could go to the river Saint Croix, it would have been so expressed, because the circumstance is very natural to have been mentioned, and very important to have been known; the lake they were to enter was described as a large lake, and connected with the Penobscot, and from whence they crossed overland to the S^t Croix river, and then again from the Saint Croix, to the river of the Etchemins.

As this could not be the west branch of the Scoodiac near the Passadumkeag, it will follow that it must have been, either the North Branch which is now called the Chaputnaticook or the river Magaquadavie that was intended. If the former was intended, then we cannot find a circumstance answerable to that part of the description of going out of the Saint Croix river by land into that of the Etchemins. The West Branch of the Scoodiac does not answer the description of a Lake, near to which there is another lake by which we go to the river Saint Croix.

162 The Agent for the United States before he shews the conclusion which reasonably will flow from a just and correct construction of

these ancient Authors will take notice of several quotations by the Agent of His Majesty, from a book entitled a History of the District of Maine. The author of that history would feel himself highly flattered by the attention of His Majesty's Agent to him as an author, but perhaps those quotations are the only mark of impoliteness, and furnish the only instance of a disagreeable personality which has taken place in the course of this controversy. Lest it should be possible that some of the Citizens of the United States should be left to conceive that the inaccuracies in that Book had an effect in a cause of the greatest importance to their Interest, it may be necessary to take some notice of the observations which are copied by his Majesty's Agent.

British Agent's
citations of the
History of the
District of Maine

There is nothing more than this said, that De Monts and his party came to a great river which was called S^t Croix, because a Cross was erected there by his (De Monts') orders, and that the next year he left the Island called the Saint Croix, and went to port Royal. 163

As the author of that History had never then seen either river, and as there was no correct map of the Country at that time to be found; as he did not write with a view to discuss the question now before the board, and had no authority to make a concession of facts in this case, even if what he had said would, if taken as fact, avail the British side of the cause, the American side is by no means bound by it.

Upon any just idea of the business, what he had said ought to be taken *all together*; in which manner it will appear that he did not perfectly understand the facts as they relate to this point, or that what he said was more in favor than against the side he now advocates. The author of that production has expressly said, p. 42: "I do not mean to give an exact geographical description of the District: but a general idea of the extent and situation of the country, is necessary, in order to have the several parts of this history understood. No writer has undertaken the geography of America, excepting a reverend author, whose information with regard to the District of Maine has deceived him in too many instances." 164

The Author of that book, page 41, mentions the Magaquadavie as the true Saint Croix, but whoever reads the description there given of it and compares the same with the plan compiled from actual survey, will see that it is altogether inaccurate.

In page 40 the line of Nova Scotia, and the description of the Scoodiac, are very inaccurately drawn. But be they either correct or incorrect, the Agent for His Majesty would by no means adopt them.

In page 59, he says the erecting a Cross gave the name of Saint Croix to the whole Country.

165 There is one fact within the knowledge of the Commissioners which it may be important for them to recollect, that is that they themselves, the Agents on either side and the people of either Nation had not an accurate and complete knowledge of the merits of this question before the investigation took place under the treaty in 1794.

The Agent for the United States will most cheerfully submit the point to the honorable Board, whether there is anything in the evidence offered by the Government of Great Britain which can reasonably contradict the position offered by the American Government that the Sieur De Monts, in the year 1604, *coasted* along the shore from the river Saint Johns to the bay of Passamaquoddy, went into the first river that offered its mouth, being the Magaquadavie, [and] there, according to the manners and feelings of the day, erected a cross, and afterwards sought a shelter on an island; that whilst the river
166¹ was, from the circumstance of the cross, called the river Saint Croix, the Island where he wintered, under the feelings of the same superstition, was called the Saint Croix, and that whilst the Magaquadavie was known by that appellation, the Scoodiac took the name, as L'Escarbot and Champlain observe, of the river des Etchemins. How far this position is supported by other circumstances, and the testimonies of Witnesses, will be considered in another place. But as there was a tribe of Indians who had at a very early date borne the name of the Passamaquoddy Indians, or a section or tribe of the Etchemins, it was natural to give the name of the people to the waters and country where they lived. The Etchemins was a nation extending from the Saint John inclusively to the Kennebec.

The Agent for His Britannic Majesty, as full proof that the Scoodiac in the year 1604, was called *the river Saint Croix*, relies upon the circumstance of the two Islands, called Muttonaguis, and Muttona-
170 guamis, being what were at that time called the *Isle de Sainte Croix*. It has been already observed that he relies on premises which, [it] is fully established, can be no adequate foundation [on which] to rest his conclusion upon the cause; [and] it can by no means follow with certainty that, if those islands were then called by that name, they must be situated in a river of the same appellation, or, if they were situated in a river known by that name, that there was no other river so denominated. The river Saint Johns, the Penobscot, and the Kennebec have all been called the Saint Croix, and the Commissioners
171 on the part of Great Britain, who made the treaty now under con-

¹ Pp. 167, 168, 169, are blank leaves.

sideration, contended first for the one and then for the other of the two rivers last mentioned for the river of that name, and as suitable for a boundary.

Though the Agent for the United States views the circumstance of the Islands contended for on the other side as a matter of no considerable importance, yet as the Agent for His Majesty seems to summon up more *zeal* on that than on any preceding fact, he will pay a cursory attention to it.

The question of
the islands

In doing this it may be proper to notice the appearances of the Islands which are considered as evidential of the fact, and also the descriptions of the Island S^t Croix by L'Escarbot and Champlain.

The deposition of Thomas Wright Esq^r, His Majesty's Surveyor General of the Island of Saint John, in the Gulph of S^t Lawrence, respecting what he saw of remains of habitations "*on Isle de Sainte Croix*," Bone Island &c, whilst on the survey thereof, October the eleventh and twelfth One thousand seven hundred and ninety seven with Robert Pagan Esq^r, and a party of men assisting upon the said survey &c. Thomas Wright Esq^r aforementioned upon his oath doth testify and declare

Deposition of
Thomas Wright

That first He examined the foundation of a building, as the people cleared away the trees rubbish &c in form of an oblong square, which he measured with a six feet rod, and found one side twenty feet long laying in the direction (by his pocket Compass) of north north east, and south south west. The other sides at right angles to it (and facing nearly the north end of the Island) measured Sixty six feet in length, the remaining two sides of the oblong square measured the same. At about twenty four feet from the southern end of said foundation towards the middle of the area thereof, he observed a large heap of stones, with some bricks of a light yellow colour which measured eight inches long, four broad and one inch and four tenths in thickness, which heap of stones, and bricks evidently appeared to have resulted from the tumbling down of a stack of chimneys (and upon removing the upper part of the rubbish) was regularly bedded in a stiff light coloured clayey mortar as in like manner was the whole of the said foundation. Some of the stones about this supposed Chimney heap, appeared black as if burnt on one side. There was also some Charcoal about the said heap that appeared in its usual form, but easily crumbled when squeezed between the fingers as rotten. There was also (about the said heap) some pieces of hard burnt Earthen ware. And this Deponent further saith, that he took some bricks from under a cedar and fir tree (whilst the men were grubbing them, and pulling them down) which trees measured from ten to twelve inches throughout their butt. There were, besides, windfalls of rotted trees over the said foundation about eighteen or twenty inches in

175 diameter, and various roots of trees that had insinuated themselves between almost all the stones of the said foundation to the earth beneath.

2. In the direction of about south by west (by his pocket compass) from the above mentioned Chimney-pile, distance from seventy to eighty feet, he observed another like pile of stones and bricks, to all appearance as the former, and bedded in like manner, with Clayey Mortar of some light or bluish colour that had evidently the same appearance of a tumbled Chimney with roots of trees interwoven.

176 3. That from this last mentioned pile of (to appearance) tumbled Chimneys, in direction (by his pocket compass) of about west by north, distance seventy or eighty feet, he observed another pile of stones which in every particular resembled the former.

4th That from this last mentioned pile he found another heap of stones in the direction (from the preceding) of South by west, distance of about thirty or forty feet, for the pile covered so much space as to render it difficult to measure the exact distance; this heap of stones &c resembled in every particular the former as described, and like them evidently appeared the result of a tumbled chimney.

177 5th Everywhere they dug about the Island, they found naught else but a sandy, hungry soil, above and beneath of the depth of from three to six feet—then rock.

6th He observed a remarkable ridge of Rocks, somewhat to the southward of the abovementioned foundation, and running some distance athward or across the island.

7th The sea Coast around the island is very rocky except at its South end, (opposite a small peninsula) where it is a high sloping sand-bluff and some Clay; in chaining from which over a shoal to the ledges south thereof, he observed large quantities of muscles and some clams, on a bed of sand clay and rocks.

8th In surveying around the Island he did not observe the least run, or any springs of fresh water tho' the people with him made diligent search for some to drink, but they were obliged to send to the main land for some.

178 9th In the neighborhood of the beforementioned foundations and piles of (to appearance) tumbled chimneys, he observed several deep holes that seem to have been dug in search of water.

10th And further this deponent saith that the island is covered with wood, some of considerable size. The species are chiefly of fir, spruce, some pines, white birch, maple, cedar and beach. He saw but one oak tree that appeared to have been lately fallen with an axe, for some of its leaves were on the branches; it measured from eighteen to twenty inches in diameter near the butt.

179 11th And lastly this deponent saith that a plan of the said survey now in his hands entitled "a plan of the Isle de sainte Croix or Bone-Island, situated in the Scoodiac or great river Saint Croix in Passamaquaddy" is a true plan of a survey of the said island, made by him the said deponent, on the twelfth day of October

in the year of Our Lord, One thousand seven hundred and ninety seven.

SAINT ANDREWS *October 24th 1797*

THOMAS WRIGHT,
Surv^r Gen^l of the Island of Saint John.

SAINT ANDREWS COUNTY OF CHARLOTTE,
October 24th 1797.

Personally appeared the above named Thomas Wright Esq. and made oath on the holy Evangelists of Almighty God to the truth of the foregoing deposition by him subscribed, Phineas Bruce Esq. was notified and present at the taking of this deposition.

Before us, signed

JOHN CURRY J. P.
DAN McMASTER J. P.

The Agent for the United States will give these circumstances a fair 180
and candid consideration, and will intrude upon the board no longer
in doing it than may be found to be absolutely necessary.

The depositions of Thomas Wright and Robert Pagan Esq^{rs} are
before the Board. These testimonies establish beyond a reasonable
doubt, that buildings of some kind or other were anciently erected on
one of the two islands within the Scoodiac, and between the Point
Saint Andrews and the waters called Oak-bay. The bricks and
stone foundations are there discovered, as described by the
Witnesses; but when this circumstance shall be carefully examined,
and considered with due accuracy, it can afford no conclusive 181
evidence of the fact which it is adduced to support.

The question is, whether from proving that settlements were an-
ciently on one of these Islands, proof is afforded that those settle-
ments were made by De Monts in 1604.

L'Escarbot says ^a "the people did work about the Effect of the
deposition
fort, seated at the end of the Island where the cannon
were lodged"; "that the lodgings represented a suburb. Within the
fort, De Monts lodged, in a room of Carpentry work. At another
part was the Store house, made of Carpentry work; and covered with
Reeds, over against the store house, were the lodgings houses of the
Gentlemen." In all the description given by this writer, we can find 182 ¹
no idea of buildings, the foundations whereof could be composed of
bricks or stones; nor could there be any Chimneys erected of bricks
in the slight and temporary habitations, which the first French voy-
ager to the Country made on the Island where his party were lodged

^a Churchill's Voyages, 8 Vol. 807.

¹ By an error in the original paging, 182 is followed by 184.—EDITOR.

for the winter. This could not be intended as a permanent habitation, or even the beginnings of a settlement. The surface of the Island was not equal to such a design, nor was there water, wood, or any competent accommodations, which would justify the attempt of a permanent settlement there.

There are no pretensions that Bricks were brought from Europe by that company or made there within that Year. The intention of
 184 De Monts, was only to secure a retreat for the winter, and in the spring to prosecute his voyage further southward; in order to make new discoveries, and to gain an advantageous place for a permanent settlement.

The buildings described as erected that fall were mere log huts, cover'd with Bark, Reeds or Lathes. The fair Carpentry work of De Monts' habitation, could be nothing more than hewed Logs; whilst the other people had their huts of rough round wood;^a No one, therefore, can do so much violence to his understanding, as to affect to believe that the foundations discovered upon those Islands are the remains of De Monts' *temporary camp*.

It may however be expected, that the agent for the United States
 185 shall meet the conjectures, boldly advanced by the agent for his Majesty, with conjectures equally plausible, and serving at least to raise doubts concerning those he has to encounter.

The history of that Country evidently shews us, that the slight habitations erected by the party under De Monts were abandoned in the year 1605, and that although they remained there, for the space of three or four years, yet no person improved them as places of residence, and that they wasted for want of permanent strength.

Those Huts or Camps could not have been erected with any considerable attention, because they were abandoned the next year, and were but of very little account with De Monts.—Purchas, page 1627,
 185¹ describes these buildings as very slightly made, having no Cellars, and says that the water came into them, in such manner as injured the people's healths. And in page 1631, he adds, that De Monts ordered Poutrincourt to search further South, for a place of settlement, *making no greater account of Port Royal than of Saint Croix*.

Mr Wright testifies that he observed holes in the ground, which appear to him as having been made with an intention to sink wells or in search after water. This circumstance is accounted for as satis-

^a If Carpentry work meant houses in the common mode of building, where were the Boards obtained and where did these people learn that kind of Architecture, and where did they find suitable tools for the business?

¹ Two pages of manuscript copy bear this number.—EDITOR.

factorily by the evidence that there was, at some time or other, a store house, or fort, in that place, many years after De Monts returned to France, as by supposing that he wintered on these Islands. There 186
can be no doubt but that the increase of population, which took place there after the year 1632, gave settlements, forts and storehouses to nearly all the Islands and shores of the Bay.

The French people had no idea of abandoning the Country. Their ideas of going further South were probably checked by the Charter of James to the Virginia Companies in 1606.

Historical tests

The Charter, as it is found in Hazard's collection, describes the bounds of North Virginia as extending to the 48th degree of North Latitude. *Hutchinson* says it extended to the forty-fifth degree. *Sith* in his history of Virginia says it was to 45, and *Doctor Belknap* says the same. The Charter of Massachusetts recited it to the 48th, and so does the charter to the Colony of New 187
Plymouth. Perhaps the whole is reconciled by the idea, which is suggested by *Sith*¹ and other historians, that the first charter or grant of territory was on the third of November, and granted the Country to the forty-eighth degree; and another, or second charter, giving to the north and south companies separate corporate powers, was made on the 20th and mentioned those powers as extending over a territory up to the 45th degree of North Latitude only.

Be this as it may, the English, under the North Virginia or New England Council, began a settlement in Kenebec in 1607, as *Hutchinson* and others tell us. This no doubt discouraged the French from 188
going further south; they therefore did not abandon Port Royal, but continued there until they were attacked in the year 1613, by *Argall*. The attempts for a permanent settlement, from 1604 to 1632, were very feeble and ineffectual.

The Kirks gained a possession against the French at Saint Johns in 1627, but this was as ineffectual and temporary as the others.

The King of France in 1632, having from his brother the King of England a cession of all the Country, began more vigorously to people, govern, and defend it.

In the year 1632, a Commission was made to *Razilly*, which has been already attended to and extracted from. How long that Com- 189
mander lived in the Country is uncertain.^a In the year 1638, the King made a Charter to the *Sieur D'Aulney Charnisay*, in which he directs him, not to change the regulations for trading with the

¹ This refers to *William Stith*, 1689-1755, author of *The History of the First Discovery and Settlement of Virginia*. Printed: London; Reprinted for S. Birt, 1753.—EDITOR.

^a *Hutchinson*, 1 vol. 128, says that *Razilly* died soon after 1635.

natives, and which had been established by Razilly in his lifetime.*

In 1635, a grant was made by the Canada Company to La Tour as Lieutenant of Acadie and the fort of La Tour on the river S^t Johns. We do not learn what improvements Razilly had made, but that he
 190 had his dwelling near the Bay of Passamaquoddy is very clear; and that he had under established rules traded with the natives is reasonably inferred from the expression used in the Commission of Char-nisay in 1638.

The two Islands in the Scoodiac do not contain land adequate to a settlement, nor are there those accommodations which are necessary
 Local data for one; but the situation of those Islands is very well for trading with the natives of that river; and very convenient to security, and easy of defence; from whence Razilly was no doubt led to erect stores there, for the purposes of traffic with the natives.

The Indian names given to those Islands go far in support of the hypothesis, that the buildings on the foundations discovered there
 191 were no other than store houses. The names *Muttanaguis* and *Mut-tanaguamis* signify, as the natives say, *the little and the great store house*.

Was there nothing further on this point, the board would be led to conclude, that the foundations now discovered upon these Islands are no evidence of these being the first habitation of De Monts, but they furnish evidence that Razilly, and others, who will be now mentioned, had store houses there at an early date of the Country.

The honorable board will not be at a loss how to account for these foundations, when they shall further investigate the history of that part of the Country between the year 1632 and 1660.

192 In the year 1638, the King of France appointed D'Aulney Char-nisay a Lieutenant-General of the country, as well for the parts of La Hève and Port Royal, which were on the Peninsula of Nova Scotia, as the main land from the middle of the bay of Fundy (or Baie Fran-çoise) as far Westward as Penobscot.

From an account of the contests between him and La Tour, we find that they had a great many people under them, in their Governments in Acadie.

La Tour contracted in 1643 with Gibbons and Hawkins for large vessels and other accommodations for a voyage to that country on the scheme of a trade: this Contract is at large in Hazard's collection.

Rogers [Gorges] at Piscataqua wrote Governor Winthrop that
 193 D'Aulney was at eight hundred pounds a month expence at S^t Johns,

that he had five hundred men and several ships.^a Governor Endicott wrote to Governor Winthrop the same year, that D'Aulney and La Tour were rendering each other weak by their wars.^b There were many letters written to Governor Winthrop with an intent to dissuade him from aiding D'Aulney, but he had a strong inclination to do it.^c

The Congress for the three New England Colonies had the matter referred to them, and decided upon it in the year 1645; this decision [is] in Hazard's collection 2^d Volume.

It appears by the histories of those transactions that there were many people and much commerce in that territory at that time. From these circumstances, the board will readily account for the 194 appearances of ancient habitations not only on the Scoodiac Isles, but on many places in that Country.

The extent of the shores, from Kennebec to Saint Johns, had its inhabitants. The wells of Popham's party, who came to Sagadahock or Kennebec in 1607, remain to this day and the remains of an ancient fort are at the mouth of that river.

A general Court was held under the Duke of York in 1670, at Sheeps-Cott river, the records whereof are partly at New York, and partly at Boston. The Colony of New Plymouth had a trading house at Penobscott in the year 1635. The French had a fort at Mount Desert and another at Saint Croix which was taken by Argall in 1613. 195 Where that fort was is now unknown, but it seems that no other foundations but those on one of these islands are now discovered; and in fact, no others have been sought after with any degree of assiduity.

The agent for the United States will not be further tedious on this point, but will for a few minutes examine the description of the foundations appearing on the Islands in the Scoodiac in further confirmation of his hypothesis, and to shew that, instead of proof on the other side as to this point, there is nothing but mere conjectures destitute of even the signs of probability.

The trees which are found on the surface covering those foundations are no witnesses to the antiquity of the buildings which were once supported by them. The natural age of spruce and fir trees is about thirty years. If these buildings were erected in 1650, there 196¹ has been the space of One hundred and forty years for the rise and fall of three successive growths of trees. We may add also one or two more, which would be caused by the common accidents of fire.

We are naturally led, upon the appearance of a great change in the

^a Hazard's Collection 498.

^b Ibid. 497.

^c Winthrop's Journal, Hutchinson and Douglass.

¹ P. 197 is blank.

face of a Country, to carry our ideas far back upon the line of time, and to lose ourselves in the sublime of antiquity, and to dwell steadfastly on the marvellous Occurrence: but when we recollect that America, at least that part of it which is called New-England, with all its wonderful changes, has existed but two lives, we may recall our attention to real facts and solid information. Peregrine White, who was the first person born in New-England, died in 1704; and John Tyng, who was born the same year, died in 1797.

- 198 Douglass tells us, Vol 1, page 307, that Major Church, in 1704, with five hundred and fifty Volunteers, visited Penobscot, Passamaquoddy and Menis, and bought off one hundred prisoners. This is an account of the last white Inhabitants living in Passamaquoddy bay. But Douglass in the same Volume says, page 329, there were in Nova Scotia French inhabitants to the number of three or four thousand fencible men. This, on the usual calculation that one fifth part of the people are capable of bearing arms, would render the whole of the inhabitants in Nova Scotia in 1748 to be twenty or twenty five thousand souls. These must have been on the shores of the bay of Fundy, for there were no settlements at Chebucto, now Halifax, until about the year 1748, and very inconsiderable before the year 1760. Douglass says, page 330, that "Nova Scotia has [in 1748] since been constituted a separate government; and has continued about forty years to this time, a nominal British province without any British settlement, only an insignificant, preventive, but precarious fort and garrison. As this country is rude, a geographical description of it cannot be expected; it is a large extent of territory, bounded westward by the Bay of Fundy, and a line running northward from St. John's to Saint Lawrence river."

If the store houses, forts &c which were on the Scoodiac Islands were destroyed by Church in 1704 on his expedition to Passamaquoddy, there may be a calculation of ninety years for the trees to have grown on their foundations, which are fully competent to the growth of three successive generations of spruce, fir and birch. A tree of either of these species is very old at thirty years. Besides this the frequent fires on the Islands, happening from Indian encampments, would increase the quantity of rubbish naturally arising from fallen limbs and prostrated trunks.

- 199 The Prisoners taken there are so many witnesses that a great number escaped to the wilderness, a great number fled over the bay to Menis, and many were killed. There is no doubt but Church, who was a fierce warrior and rather cruel than otherwise, totally destroyed all the habitations he found in the Country. But [in]

ninety years, or rather computing from that time to the period when the first settlers went down after the Peace of sixty three, there has been full time enough for the wilderness to reassume its natural appearance, and its rough dominion over a deserted Country. No habitations, or the remains of art or industry, were seen on the shores or islands there, when the people visited the country after the year 1763.

Hutchinson, 2^d Volume page 144, informs us that Church went up the western Passamaquoddy; that he there took Prisoners, and amongst others an Officer by the name of Gourdon; that he was attacked by the people, from whom he had great apprehensions. The same author, page 97, speaks of the people of Acadie as somewhat numerous and very very miserable in the year 1696.

200¹

The foundations described by M^r Pagan, and M^r Wright, are proper for the extent of store houses, but are by no means like those of ancient forts or small buildings, erected at the opening of a new settlement in a wilderness.

202

It is very extraordinary that there are no ancient foundations discovered, excepting those on a small island in the Scoodiac. The Country in the year 1763 was found a mere wilderness, there was not the trace of a human footstep there, as appears from the testimony of Nichols, Boyd and others (which have a place in this argument); yet the Country was settled permanently in 1632, and continued as the place of many families, who lived in a great degree of splendor for the age, until the year 1654, when it was subjugated by the forces of Oliver Cromwell. From that time its inhabitants were very numerous, until after the year 1704.

203

The French inhabitants were removed from the other side of the Bay, by an order from the English Government in 1755. Where then are the foundations of the houses of all those people who were once on the North side of the Bay? are there none to be discovered but those on these small Islands? seventy years had elapsed, from the treaty of S^t Germain's (1632) to the removal of those people by Church, and one hundred and twenty to the removal of the miserable people (in 1755). Generations had reached from the cradle to old age, and had passed away, but left no traces of their domicile on the North side of the Bay where there must have been many thousands of Inhabitants.

The trees now standing on these Islands cannot be more than of thirty years growth. Those which are prostrate at their feet may be allowed to have stood sixty years, and then there is an allowance

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¹ P. 201 is blank.

for a former growth, the space of sixty years, between the year 1648, when the store house erected there might have been consumed by fire, or demolished by the wars of De La Tour and D'Aulney. We have an association of ideas, naturally fix'd in our minds, upon seeing a rude and uncultivated wilderness. We seem to be necessarily drawn from a first view of it to contemplate it as having remained in its original, natural state from the creation: when in fact, upon due recollection, we are obliged to acknowledge that, where there have been no cities erected of marble, stone, or bricks, with strong walls and mighty towers; where the habitations have been slightly formed and for temporary purposes; half a century of unimprovements and vacancy will give all the appearance of a natural wilderness to the face of a Country.

We have no necessity to take a case in imagination, which is stronger than the one really before us. The whole of that Country, from Penobscot to the Bay of Chaleurs, was inhabited for the term of more than seventy years before the year 1704, when Church removed the French from Passamaquoddy and the Bay of Fundy, and yet the discovery of an ancient habitation is very rare: there was a fort on Mount Desert, called Mount Mansel in 1630; if the foundations of that can be seen, there are none of those of the cotemporary habitations which can be discovered.

These circumstances are opened by the agent for the United States in order to support this argument, that the foundations of buildings discovered on the Scoodiac islands were laid there about the year 1640, or perhaps soon after the Sieur Razilly had his commission in 1632. It is very clear, as he conceives, from all the evidence, from all the circumstances of De Monts' voyage, from his taking his residence in Passamaquoddy bay for a winter only, with an intention of going further south in the spring, from the want of water discovered in the Island he was on, wherever that was, from the short space of time which he had to erect his winter quarters, and from the manner of his building, that he neither brought bricks from Europe [n]or made them at the Island Saint Croix, that he laid no stone foundations in lime, or other cement, or built any chimneys. Therefore, the conclusion is, that the foundations discovered were laid there long after that adventurer had done with America.

The bricks on that Island are similar to those which are in several old buildings in Boston, they are what are the[re] called Grey Dutch stock.^a In the year 1711 the Pilasters of the State house then built

^a The English agent has one or more of them here which he will shew the board if it pleases.

in Boston were found with them. There is no doubt but that some of these were bro't from Amsterdam to Boston, and others might be made in this Country, but it will be asked how these bricks could be carried from Boston to the Scoudiac River.

In the year 1634, according to Governor Hutchinson, first Vol. P. 128, La Tour had "a grant of the river and bay of St. Croix and islands and lands adjacent." That D'Aulney de Charnisay, had a 208 grant of all to the westward of Saint Croix, "that their chief views were, to trade with the natives, but there were great clashings of Interest. La Tour sent Rochet, a protestant of Rochel, to Boston from St Johns, with a proposal for a free trade between the Colonies." The next year 1642, he sent a shallop with his Lieutenant and fourteen men with Letters to Boston, with a renewal of proposals for a free trade. The same year, he came to Boston himself in a Ship of 140 Men. He hired in Boston four ships of force, and procured 70 or 80 Volunteers and went back to his fort.

D'Aulney returned from France in 1644, and captured several of the Boston vessels and others from Saco, which were on trading voyages in the bay of Fundy with La Tour. Hutchinson, 1 Vol. 131. 209 D'Aulney was that year in his fort at Penobscot, his farm house and cattle were six miles from the fort (Hut. 131): this shews how the Country then was settled.

In 1644, the Governor and Magistrates of Massachusetts entered into a treaty of commerce with D'Aulney; the treaty is in Hazard's collection, in Latin, and translated in Hutchinson, wherein it was provided, "that it shall be lawful for all men, both the French and English, to trade with each other." "This agreement [says the same author] freed the people from the fears they were under of ravages upon their small vessels and out plantations, La Tour was suffered to hire a vessel to carry a supply of provisions to his fort; 210 which vessel he took under his convoy and returned home." In a marginal note, page 133, an account is given of several captures by D'Aulney: that La Tour hired three or four ships, which were in Boston harbour, to go down to St Johns.

Hutchinson gives us a very particular account of D'Aulney's embassy to Boston in 1646, of the pomp and parade made on that occasion; that in the same year he took La Tour's fort, with ten thousand pounds sterling in furs, and other merchandize, ordnance stores, Plate, Jewels &c to the great loss of the Massachusetts Merchants, to one only of whom, (Major Gibbons) La Tour was indebted twenty five hundred pounds, which was wholly lost. D'Aulney 211 died in the year 1652, and La Tour married his widow, and

repossessed himself in whole or in part of his former estate in Nova Scotia.

From these pieces of history, we are convinced that there was a very great trade carried on from the bay of Fundy to Boston, and to other parts of New-England; that there was also a great trade between Europe and that part of America, about one hundred and fifty years ago.^a There can be then, no difficulty in concluding, that the foundations discover'd, upon the islands in the Scoodiac, were laid about that time for storehouses; that the Bricks found
212¹ there were made in Boston, and carried to that river by vessels employed in the intercourse between the two Colonies, or perhaps made in Europe, and brought over at that time, as is before observed.

But as a great trade was, in and about the year 1650, carried on between Boston and Amsterdam, and had been continued, with but short interruptions, from the time when the New England people left the Netherlands to come to America, and as a great number of bricks had been brought as ballast from Amsterdam to Boston, it is much more probable that the bricks found on the Scoodiac islands, which are the Grey-Dutch stock, were imported to Boston, and sold to the French there. There were many buildings erected of them in those days in Boston.

214 But suppose that the bricks found on that island were not carried from Boston, as has been conjectured, or brought from Europe by the French people in 1640, what is there that renders it improbable that the bricks were made, either at Passamaquoddy bay or at Port Royal?

Whoever will take the trouble to read Hutchinson's history,^b and other histories relating to that part of the Country,^c will find that there were a multitude of French people between the year 1632 and 1654 at Port Royal, La Heve, S^t Johns, Passamaquoddy bay, Mount Desert, and Penobscot. If brick kilns were then had near S^t Andrews point, the subsequent depopulations of the Country would render it
215 impracticable to find the places where they had been. The wilderness would conceal the remains of the Kilns in the same manner in which the foundations of the ancient buildings on the Islands have been concealed from every eye, but that of an interested and suspicious search. Bricks might have been brought from Port Royal,

^a At which time bricks might have been brought from thence in the merchants' ships as ballast. "A Dutch ship of 300 tons arrived from the West India^a laden with salt which she sold here for plank and pipe staves." Winthrop's Journal, page 252; this was in 1642.

¹ P. 213 is blank.

^b 1 Vol. 126 and forward.

^c Hubbard and Gorges.

Saint Johns, or La Heve, or from any part of Europe or America for those buildings long after the year 1604.

The agent of the United States confesses that he has dwelt too long upon the appearances on those Islands, because he considers it as obviously unimportant to his cause, whether De Monts wintered upon them or not. But as the agent for his Majesty has been so laboriously minute on the description given of these by Champlain and L'Escarbot, the Agent for the United States will pay a concise attention to that part of his argument.

Recurrence to
descriptions by
Champlain and
L'Escarbot

Champlain's description of the courses and distances, in order to find the islands, may answer as to the islands in the Scoodiac, or for other islands in the bay, but it is submitted to [the] Hon^{ble} Board whether these islands are, as to their size, situation, or extent, like those described by that writer. 216

L'Escarbot describes the Island thus, "the said island containeth some half a league in circuit, and at the end of it, on the sea side there is a mount, or small hill, which is, as it were, a little isle severed from the other, where Mons^r De Monts' Cannon were placed." Champlain describes the island as being eight or nine hundred paces in circumference; if these are taken for geometrical paces of five feet, it will be more than half as extensive as L'Escarbot makes it.

Question as to
the island where
De Monts
wintered

These men did not attend to a minute accuracy in the description of the extent of the island. If viewed as to its extent and situation, the description may suit several other islands in the waters of the Bay, better than it suits those in the Scoodiac river; but the Agent of the United States does not conceive it necessary to be minute and particular, on a point which can have no considerable weight in the cause. A few words may however be allowed on the description of the Island. 217

The Island does not contain half a league, or a quarter of a league in circumference; unless both islands are comprehended in the admeasurement; and the space between them reckoned in the circumference. "At the end of it, on the sea side, there is a mount or small hill, which is as it were a little Island severed from the other." On the largest of the Scoodiac islands, there is no such Hill as is here described—the little island is half a mile from the other, and the trifle of land it contains is not so high as the banks of the other island are, and there is, besides, a ship channel between the two. It is an ideal business to suppose that these islands were once in a more close neighborhood. Should the honorable board admit loose and improb- 218

able conjectures in the place of evidence, he who has the boldest imagination would always have success. We know that islands have been sunk, others raised up, and the face of the terraqueous globe changed from time to time by strong convulsions; but this can have
 219 no greater influence here than another conjecture, which may be made, that as no Island can be found answering exactly to the description of those ancient writers, an earthquake has caused the Island where De Monts wintered to be swallowed up.

There is one insuperable difficulty, in making those Islands answer to the description given by early voyagers; they describe the hill on the side next the sea as severed from the other, when in fact the largest ship can pass between the two islands contended for. They therefore can by no means answer to the mode of expression "as it were severed." The small island called *Muttonaguis* does not answer to *this little isle as it were*, in another respect; De Monts placed his Cannon on the hill, which *as it were* was severed from the other, and had by
 220 ¹ that the full command of the river. Now the little island in the Scoodiac is not so high as the other, nor is it in a position to defend the river, or to command the passage up and down the same.

The writers under consideration speak of the island where De Monts wintered, as having commodious harbours in it; but in these Islands a strong tide, and a great exposure to the winds, are found, without any harbour, or shelter from the storms or from the ice.

228 When the testimony of M^r Pagan is carefully considered, it must be acknowledged as conclusive evidence that the remains of foundations, discovered in the Scoodiac Islands are not
 Testimony of Mr. Pagan what the agent for His Britannic Majesty conceives them to be; and that they were laid there long since De Monts was laid in his grave.

A few observations on the testimony of this Witness are necessary.

He says that the Clay, or Cement, is in a good state of preservation; and the layers between the stones preserve their form and consistency. There is perhaps no example to be found which can satisfy
 229 the inquiry, how long mortar, or clay cement, can be preserved under ground, where they have not been covered by earthquakes or convulsions, but where the earth has been slowly and gradually formed, by the falling and rotting of vegetable substances. One fact is clearly proved from the state of these foundations; that they must have supported buildings, long since those erected by De Monts were levelled with the ground.

He says that bricks are there found in a good state of hardness, or

¹ Pp. 221-7 are blank.

preservation; that there are the remains of an oven, and appearances indicating the remains of Chimneys, and the marks of a fire, as if a conflagration had consumed the buildings.

The agent for the United States could not have expected evidence, 230¹ so perfectly conclusive as this must be, to every impartial man, in order to prove that these foundations had never any kind of connection with the camps, or huts, built by De Monts in 1604, and to support the position, which he has the honour to offer, on the consideration of the two testimonies together: For it is evident from the history and circumstances of his voyage, and the intentions of his residence on the Island where he wintered, that he could never have laid the foundations now discovered on the Scoodiac Islands, or placed the bricks or stones which are found there.

The circumstance of the piece of a pitcher, and a metal spoon, deserve no kind of attention; such are found in every place, on all the rivers, where the savages have had an encampment, town, or residence.

Having thus briefly reviewed the evidence offered by his Majesty's 234 agent, on the question, whether the Scoodiac was originally, on taking possession of the Country, in 1604, called the river Saint Croix, the agent for the United States proceeds to the second question, propos'd in his method, to wit, whether it is proved by the evidence offered that the waters now denominated Scoodiac river were, by ancient Charters, deeds, and treaties contemplated 235 as the river Saint Croix.

Historical evidence as to the alleged identity of the Schoodiac with the St. Croix

In the discussion of this question, it will be proper to take those ancient documents according to their several dates. The first English Charter respecting this part of the Country was 236 in the nineteenth year of King James, and five years before the Charter to Alexander: This Charter was of the Country called by the name of North Virginia, between 44 and 48 degrees of North latitude from the equator.

Ancient charters

The next charter from the same sovereign, is that to which the attention of the board has been so frequently called, and we have to examine whether there is any thing in it which fixes upon the river Scoodiac as the river Saint Croix, in exclusion or in preference to any other river or water. The words of description in that charter are these: To run from S^t Mary's bay, directly to the North, into the 236 Country of the Souriquois and Etchemins, to the river commonly called Saint Croix.

¹ Pp. 231-3 are blank.

Champlain, and L'Escarbot, say that the Indians on the East part of the bay of Fundy were called the Souriquois, and those on the West the Etchemins. A river which run[s] through the middle of the Country of the latter could never be consider'd as the dividing line between them and the other nation: from thence it may be concluded, with greater strength of reasoning than there is to support many of the positive assertions on the other side, that this river was never intended as the river Saint-Croix, mentioned in the Charter to Sir William Alexander.

The memoirs of the Commissioners at Paris, between 1752 and 1755, are cited as an authority by both sides; we may examine the map in the first volume of those transactions, and be convinced that there was then no idea of the Scoodiac being the ancient river Saint Croix. The grant to Alexander is there delineated: a copy whereof is herewith exhibited, by which it appears that the Magaquadavie was then considered as the Saint Croix, and the line is drawn so as to comprehend the waters which empty themselves into it from the Westward.

The Charter or commission from the French King, in 1632, to Razilly, is relied much upon by the agent for his Majesty, as proof that the Scoodiac is the river known exclusively by the name of Saint Croix.

There was no instrument, treaty, or document, from the date of the foregoing Charter of Alexander until he sold his patent to Stephen La Tour in 1630, which has a tendency to throw light upon this question; nor is there any description in that instrument which leads to a contemplation of the river contended for, by the agent for his Majesty, as the river Saint Croix.

By the treaty of Saint Germain, made in 1632, the whole Country of Nova Scotia and Accadia being ceded to the French King, he parcelled it out, and by his grant to Razilly a description is given, which is urged by the agent for the English Government as affording a favorable circumstance to his side of the question.

That Commission, is, as to the description of territory, in these words

L'étendue des terres & pays qui ensuivent, à savoir la rivière & baie Sainte-Croix, isles y contenues, & terres adjacentes d'une part & d'autre en la Nouvelle France, de l'étendue de douze lieues de larges, à prendre le point milieu en l'isle Sainte-Croix, où le sieur de Mons a hiverné, & vingt lieues de profondeur depuis le port aux coquilles, qui est en l'une des isles de l'entrée de la rivière & baie Sainte-Croix.

The translation of this description is given by the agent for his Majesty very literally, but the following arrangement of words gives the sense more justly,

The following lands and country in New France, Viz. the river and bay of Saint Croix, the isles contained therein, and the lands adjoining on the one part and the other of twelve leagues in width, taking a point in the middle of the island of Saint Croix, where the sieur De Monts wintered, and from the port of shells, which is in one of the Isles, in the river and bay of S^t Croix, twenty leagues deep into the Country.

The agent for his Majesty has given a place to this patent, which may rest peaceably where he has laid it, without any opposition from the United States of America, because there is no possible argument 240 which can be reasonably drawn from its location, to prove that the river Scoodiac was anciently called the river Saint Croix.

To leave the agent for his Majesty in the undisturbed possession of his strong assertions, and confident epithets, we will take the facts contained in this circumstance, in their natural and simple order, and candidly allow all the conclusions which can be deduced from them.

The Agent for his Majesty has uniformly proceeded on a mistaken Hypothesis, that if he proved the Islands, Muttonaguis, and Muttonaguamis, to be the isle of Saint Croix, that he proved the Scoodiac river to be the ancient river Saint Croix. The agent of the United States, in order that the evidence might have its proper and natural effect, divides the question, and denies the conclusion contended for with so much address on the other side. 241

The Tract of territory, granted to Razilly, is a tract of twelve leagues wide, from east to west, and twenty leagues from south to north, the middle line, or center of which, was to be in the middle of the Island where M. De Monts wintered. It appears in the grant, that there was a place called the Harbour of Shells; this place the agent for his Majesty calls Clam-Cove, which, he says, is in an Island in Saint Andrews Bay. The grant to Razilly expresses it to be one of the islands in the Bay of S^t Croix, but does not give such a description as will justify the conjecture, on which so much of his argument depends. Nor is it any where said, as the agent for his Majesty supposes, that a line due north from the port of shells is to strike the middle of the Island where De Monts wintered, but the territory is to be twenty leagues deep *from the port of shells*, into the Country Northward, on a due North line, or course, and the center line is to 242 be in that Island; but whether the port of shells was east, west, or south from the Island, where De Monts wintered, does not appear.

The agent for the English government is here drawn to a strait, similar to that in which he was involved, in regard to the Northwest angle of Nova Scotia. He proves Clam Cove to be the ancient harbour of shells, because a south line from the islands in the Scoodiac will strike it, and proves that these are the ancient islands Saint Croix, because a north line from some part of that will strike the center of one of these. This is clearly arguing in a Circle without coming to a conclusive point. Each position is a conclusion drawn from the other, and neither is supported, because there is no evidence to
243 maintain either as a principal fact, from whence the other may be reasonably inferred.

But suppose the Islands in the Scoodiac, near Oak Bay, are the Saint Croix Islands intended in the grant to Razilly, and that Clam Cove is the harbour, or port of shells mentioned in that grant, how does it follow from thence, that the Scoodiac was at that time called the Saint Croix river? The grant expressly says, that the island where the Harbour of shells was found, was an island at the entrance of the river and bay of Saint Croix. Now it is very clear, that the whole of what is now called the Bay of Passamaquoddy, or Saint Andrews bay, was there intended by the name of the Bay or river de Sainte Croix.

If the waters took their name, as is mistakenly said to have been suggested by the Commissioners at Paris, from the Islands, why
244 should that body of water, which was several miles from thence, be called after their name? If the river Scoodiac was the ancient Saint Croix, what greater reason could there be for giving the bay that name, on that account, than there would be for calling it by that name, because the Magaquadavie was so called? Both rivers empty their waters into the bay and both have the same connexion with it. It seems that, in Razilly's grant, all the islands in that bay were denominated the islands in the river and bay of Saint Croix.

Here is a good understanding of L'Escarbot's description of a river which *is properly sea*. The bay of Passamaquoddy is the only body of waters which can answer to that description, and there can be no doubt but that this bay was what he intended by it, although from
245 certain circumstances, which have been already mentioned, the name was more particularly applied to the Magaquadavie.

The Country appears, by L'Escarbot, to be divided into two denominations, the land of the Etchemins and Souriquois and that of the Armouchiquois; those from S^t Johns to Kennebeck are by him called by the first name, Etchemins and Souriquois, and the Country from Kennebeck to Cape Malabar is the land

of the Armouchiquois; and [he] says nothing of the river Saint Croix, but that the river of that name and Pemptegoet are included in the land of the Etchemins &c He further says that, there being a war between the Etchemins and the Armouchiquois, an ambassador who came from the Etchemins was of the river Saint Croix, but does not describe the river.

There is no European document, after the Commission made to Razilly, and before the year 1664, in which the question before us 246 was attended to, or from which any circumstance can be raised interesting to either side of it.

Examination of
later documents

In the year 1664, King Charles granted to his brother the Duke of York, all that part of main land of New England, beginning at a certain place called or known by the name of St Croix, next adjoining to New-Scotland in America, and from thence, extending along the sea coast, unto a certain place called *Pemaqui* or *Pemaquid*, and so up the river thereof, to the furthest head of the same, as it tendeth northward, and extending from thence to the river Canada northward.

Here the territory described begins at a *place* called Saint Croix, nothing is said of a river, and we shall find on examination that the whole place or Country was called the place of the Holy Cross. But the place called Saint Croix is next adjoining to New Scot- 247 land.

It has been already observed, and, as the agent for the United States conceives, satisfactorily proved, that the northern part of the Continent, including Canada, was distinguished from that part which is between the fortieth and forty-fifth degrees of latitude, north of the equator, by the name of New Scotland, before the grant of King James to Sir William Alexander.

The grant to the New England Council was in 1606, of the territory, as high as forty fifth degree of North latitude, by the name of New England. The territory from that time to 1621 either had no name with the English, or it was named New Scotland.

It is seen that the King, in his charter to Alexander, declared that the Province should forever *after* be called by the name of New Scotland, but it does by no means follow from thence that it had not, with other northern territory, been called by that name before that time. King Charles, in 1664, might therefore bound the Duke of 248 York's patent upon Nova Scotia, intending to carry him to the ancient line of North Virginia or New England, which at the sea was on the forty fifth degree of North latitude, and at a place called Saint Croix, because all the extensive settlements there, at that day, were

known by that name. The proof that the settlements there were so called at that time will be produced presently.

In the year 1656, Oliver Cromwell had granted to Stephen La Tour, Thomas Temple and William Crowne, the country and territory called Acadie, and the country named Nova Scotia, under a description which is in the margin,¹ and extending from S^t Johns river to the river Penobscot. Here the whole of the Country is called by the name of Nova Scotia, and Acadie. In the Controversy which took place between the English and French nations, in the year 1750, and which was managed by Sir William Shirley and others, the French insisted that there was a large tract of territory, between Nova Scotia and New England, known by the name of Acadie, and
 249 which had not been ceded by the treaty of Utrecht; but the English contended that the whole was called indifferently Acadie or Nova Scotia, and that the whole by this appellation was ceded by that
 250 treaty. But whether the Commissioners there were correct or not, yet it is very clear that Charles the second, in his grant to the Duke of York, intended to make the Province to extend as far north as North Virginia had extended, and had no regard to any river as the northern limits, but bounded him by a *place* called Saint Croix, which could, in no sense, be taken for the islands now contended for, on the part of the English Government.

We have no other ancient charter, Treaty, grant or document, in which the river is treated of, as of importance, or treated of as a boundary. It is mentioned in the acts of the general
 Letter of the
 Lords of Trade, court of Massachusetts in the year 1700; and by the
 1700 Lords of Trade, and Secretary of State, about that time, but whether it was done in such a manner as to support the position of his Majesty's agent, that the Scoodiac was the river then intended by that appellation, is now to be considered.

The letter of the Secretary of State on this point has been before
 251 recited; but it may be necessary to notice it again in this place; the right of the English to the Eastern Country, as far as the Saint Croix,

¹ Le pays et territoire appelé l'Acadie, et partie du pays nommé la nouvelle Ecosse, depuis Merliguesche du côté de l'est, jusqu'au port et cap de la Hève, rangeant les côtes de la mer jusques au cap de Sable; et de là, jusqu'à un certain port appelé le port la Tour, et à présent nommé le port l'Esmeron; et de là, rangeant le côtes et isles jusqu'au cap Fourchu; et de là, jusques au cap et rivière Sainte-Marie, rangeant les côtes de la mer, jusqu'au Port-Royal; et de là, rangeant les côtes jusqu'au fond de la Baie; et de là, rangeant ladite Baie jusqu'au fort S^t Jean; et de là, rangeant toute la côte jusqu'à Pentagoet et rivière S^t George dans Mescourus, situé sur les confins de la Nouvelle Angleterre, du côté de l'ouest et en dedans les terres tout le long desdites côtes, jusqu'à cent lieues de profondeur; et plus avant, jusqu'à la première habitation faite par les Flamans ou François ou par les Anglois de la Nouvelle Angleterre.

was insisted upon, "As to the boundaries we have always insisted, and shall always insist upon the English right as far as the river Saint Croix."

^a From this mode of expression, and which in fact is, as hath been heretofore shewn, the origin of the river Saint Croix's being contemplated as the Eastern limits of Massachusetts, no one can say that the Scoodiac has a preference to the Magaquadavie, or that the one river is described rather than the other. Should we attend to the only plan or map then existing of the Country, as founded in survey or observation, we shall find which river was probably intended. 252

Southack's map was the only chart then relied on, no chart prior to this had been produced, which gave any tolerable resemblance of the Country, and his chart gives us the Magaquadavie as the river Saint Croix. It has been heretofore observed, that there was the utmost confidence placed in that man's skill and industry, as well by the Crown as by the Province.^b He had an opportunity then to converse with the ancient native Indians, as well as with the French Inhabitants, who had been born in that part of the Continent, and who had grown old upon the spot. Those inhabitants must have lived, and been conversant with many who had been inhabitants there under the governments of Razilly, De La Tour, and D'Aulney. Had these men, in that day, called the Scoodiac the Saint Croix, it would have been impossible that Southack should have marked that name on a river which empties its water into the bay of Passamaquoddy, on the north east side thereof, and there can be no pretence of his having an undue, or corrupt prejudice on the point. 253

From the year 1697, the intercourse between the English settlers and the French people was of very little consequence; there were, frequently, Indian and other wars, between the treaty of Utrecht and the war of 1744. The Indians prevented the English from gaining settlements on the bay of Fundy, and the French neutrals, who had submitted on the treaty of Utrecht, were secretly inspiring the savages with hatred against the English Inhabitants.

There were a number of maps at that time exhibited, and though

^a Lords of Trade's Letter to Lord Bellamont Governor of Massachusetts in 1700.

^b Douglass says vol. 1, page 328, Cyprian Southack was in April 1720 appointed a Councillor by Governor Phillips.

The agent for his Majesty, with a degree of confidence by no means related to his cause, [contends] that the river Scoodiac was never called Passamaquoddy, yet in Governor Dudley's instructions to Col^d Church in 1703, he calls that river by that name, and Church in his report to the Governor says, that he attacked the Indians and French at the falls on that river. Vide Church's Hist. p. 166 and 180.

they were not from any legal authority, yet they serve as evidence of the public opinion, and common understanding, in regard to the boundary, between what had then

254 *Other maps* lately been attended to as the Province of Nova Scotia, and the Province of Massachusetts Bay. I introduce these maps in this place, because I shall here begin to consider circumstances, so much relied upon by the agent for his Majesty, which took place between the English and French Commissioners, from the year 1750, to the year 1755.

The map made by Southack exhibits the river which comes in on the north east side of Passamaquoddy Bay as vastly larger than even the Penobscot, and though this may now be considered as incorrect, yet there was, no doubt, a good reason for it at that time. The artist had probably found, upon enquiry, that the Magaquadavie was the ancient Saint Croix, and he rendered it notable, and gave it the appearance of importance on his map, because it was considered as an
255 important boundary between two Provinces. Turner, about the year 1746, produced a map of the Province of Nova Scotia; wherein he exhibits the Bay of Passamaquoddy, and gives the same river as the Saint Croix, and as the Boundary which had been given by Southack, and all others, who had produced maps prior to his. None of them exhibited the boundary contended for by his Majesty's agent, as the river Saint Croix. A French chart was made in 1755, agreeing with those which had been produced by the English people. A copy of it is annexed.

Another of 1757, which is also copied; none of these maps can be considered as accurate, but they all exhibit the same river, as the river Saint Croix, and place its mouth on the north east side of the Bay. The two French maps above mentioned were copied from charts in
256 ¹ the marine deposit in France; the one of 1757 has more useful marks upon it than the others have. The islands, more especially Grand Menan, Passamaquoddy, and Deer Island, have such positions as clearly shew that the artist did not intend the Scoodiac, by the river which he denominated the Saint Croix. In addition to this, there is a communication by an Inlet of a shoal of water, which gives to the point of land inclosed by the waters of the western and eastern Bay the appearance of an Island. This is clearly seen to be intended for what we now call the point of St Andrews. The islands, and all the marks on the shores, confirm this important fact, and no one, who casts his eye on this map, can for one moment doubt of the truth of it.

258 We will now attend to a map which is prefixed to the memoirs of the

¹ No. 257 erased in record copy.

Commissioners at Paris, and then to the assertions of those Gentlemen, which are relied upon with so much confidence on the other side.

The map in the first volume of the French edition of those memoirs is copied, and the copy is herewith exhibited.

The map cannot be considered as giving a complete, and accurate portrait of the Country; it was intended for a general view only. The Islands are not noted in it, excepting one, which is probably intended for Grand Menan or Campo Bello and not properly designated for either. But the Bay of Passamaquoddy is given, and two rivers issuing into it; one on the north, and the other on the westerly side; the former whereof is called the river Saint Croix. This map is on the same idea, in regard to this fact, as all the preceding maps are said to be. 259

The source of the river Saint-Croix is there given, more like to what the real source is now, on actual survey, found to be, than could be expected: and more like the natural situation of the source of the Magaquadavie than could have been done from imagination, and therefore it may be fairly concluded that the river had, after the settlement of Nova Scotia was revived, or after the recession of Massachusetts in 1703 to that river as a boundary, become an object of inquiry; and that the plan of it was made from all the representations of the savages, which must have been given with as much precision, and correctness, as usually is obtained on such occasions. It must be considered as a full answer to the argument raised by his Majesty's agent, from the circumstances found in the memoirs of the Commissioners at Paris in 1750, that they were, for years, continuing a verbal controversy, in which no facts were conceived to be satisfactorily established by evidence, no result was formed, nor any conclusions drawn, but the whole remained to be settled by the bayonet in a course of a number of Campaigns, which ended in 1763. 260

But the point then ostensibly in issue ought to be explained, and understood. The treaty of Utrecht ceded to the British crown all the Country of Nova Scotia, or Accadia, comprehended within its ancient limits, and Port Royal, called Annapolis Royal. The French nation contended that there was a certain Territory, which was included in what was anciently Nova Scotia and comprehending the Peninsula of Nova Scotia. 261

British-French
discussions at
Paris

The English Commissioners contended that the words Nova Scotia and Acadie meant the same territory, and contained all the lands lying within the Peninsula and between Canada river, on the east, and the bounds of North Virginia on the west; that the bounds of North 262

Virginia, and those of New England were the same; that New England extended to the 45° of northern latitude, and that a river called Saint Croix was, at the sea, the boundary between the two Countries or Provinces, from whence there was a north line to Canada.

On this view of the question, before the Commissioners of 1750, we are not to expect to find a minute and accurate description of the position of the river Saint-Croix, the one nation claimed to the river Kennebeck, and the other denied their having any colour of claim at all. Had the English Commissioners agreed, that the French crown did in fact exhibit a right to territory on the Continent, between the Saint Lawrence and Kennebeck, there might have been a necessity for a description of the limits of the right or claim, but, the whole
 263 claim being denied, the question turned altogether upon the construction of the treaty, and in fact was only this, whether Nova Scotia and Acadia meant and intended two different Countries, or whether this was only an exegetical mode of expression.

These Commissioners had no documents to aid their inquiries, excepting such as we now have, and therefore their opinions, expressed not as judges, but as advocates; not between the same parties, and not on the point now before this board, cannot be considered as an authority, obligatory in the present cause.

The agent for his Majesty, P. 47,¹ confidently avers that the river contemplated by those Commissioners, as the river Saint Croix, was the same which had been originally so denominated by the sieur De Monts in the year 1604, and was contemplated as the western
 264 boundary of Nova Scotia; and further, that to this effect are the numerous grants, Charters, references, histories &c. We will not burden the argument with unnecessary harangues, nor depend upon confident averments.

The first position is, that the river contemplated as the river Saint Croix by those Commissioners, was by them understood to be the Saint Croix of De Monts. Suppose this assertion to be true, and the opinion of those Commissioners to be an authority, what is the inference? will it follow from thence that they intended the Scoodiac as the river? If we examine the maps then before them, and those published about that time, we shall conclude that they had their eye not on that, but on the river Magaquadavie.

The agent for his Majesty has uniformly gone on the mistaken
 265 idea, that if he could prove that De Monts wintered on an Island in the Scoodiac, it would of course follow, that the river would have the same name, when in fact, there is no natural, and necessary con-

¹ Supra, 194.

nexion, between the name of the land, and the water: and the whole train of the positive testimony is opposed to his supposition.

When he asserts, that ancient writers have called the Scoodiac the Saint Croix, and the waters which formed the Islands Saint-Croix by the same name, he has been detected in his errors, and is not able to exhibit one single instance in order to prove that the river, where the Island Saint Croix was, had been called by that name. The river Saint-Croix is mentioned, the Bay of Saint Croix is spoken of, the Island Saint Croix is described, and the *place* called Saint Croix alluded to as a boundary, and set forth as having been taken, and destroy'd; but still, the main point, necessary to the principal position 266 of the agent for his Majesty, remains without support.^a

The ancient grants, Charters, and Histories contemplate a place or river, called by the name of Saint Croix, but none of them have attempted to fix upon the Scoodiac as the river of that name: nor have they or any of them, designated any place in the waters of the Scoodiac, as the place called Saint Croix, but that name was clearly given to a vast extent of territory, on the north side of the bay of Fundy.

The settlements of the French, in that Country, were by Champlain and L'Escarbot called Port Royal and Saint Croix. It is well known that Port Royal is on the south side of the bay of Fundy, and it is as clear that the place called Saint Croix was on the north side of 267¹ those waters. . . . Port Royal, and Saint Croix, are in Acadie says Champlain^b—that the people stayed three years and an half at Saint Croix and Port Royal.^c

Sir Samuel Argall, in 1613, received orders to drive the French from their habitations and forts at Pentagoet, Saint Croix, and Port Royal, in which act of Demolition of their settlements the Crown of France then acquiesced.^d Having thus attended to the question, Whether the evidence offered in this controversy can amount to proof, that the river Scoodiac was denominated the Saint Croix

Interpretation of
ancient docu- 280
ments not con-
clusive as to
intention of
Treaty of 1783

^a In Champlain's Voyages, ed. 1613, page 113. "Le 5. Septembre nous partismes de rechef du port Royal. Le 7. nous fusmes à l'entrée de la rivière S. Croix, où trouvasmes quantité de sauvages, entre autres Secondon & Messamouet. Nous nous y pensames perdre contre un islet de rochers, par l'opiniastreté de Champdoré, à quoy il estoit fort subiect. Le lendemain fusmes dedans une chaloupe à l'isle de S. Croix, où le sieur De Mons avoit yverné."

By this it appears, that the whole bay, the common receptacle of both rivers, was called by the name of Saint Croix. He says, on the 7th they entered into the mouth of the river Saint Croix, and ran on an Island of Rocks, and the next day arrived at the Island of Saint Croix. There is no Island between the mouth of the Scoodiac, and the islands contended for, as the isles de Sainte Croix, where this disaster could have happened, nor could it have taken them a day to go from the mouth of the Scoodiac to those Islands.

¹ Pp. 268 and 269 are blank leaves. The next page begins 280.

^b Mem. of Com. at Paris, Volume 1, p. 109.

^c Ibid. 107.

^d Ibid. 466.

by the first European adventurer who saw it, and whether it was called by that name in the ancient grants, charters and deeds, which are mentioned, the agent for the United States will briefly attend to the next question by him proposed: "Whether if in all the ancient grants, Charters and Treaties, the river Scoodiac was called the river Saint Croix, it will from thence follow, on the evidence before the Board, that the same river was truly intended by the treaty of peace, as a part of the boundary therein given."

From the tenor of some of the arguments advanced, it appears that there may be an intention to rely as the last resort on the question, Whether, if the river marked by the Commissioners who formed the Treaty of Peace is in fact the Magaquadavie, and yet the Scoodiac had anciently been known as the Saint Croix, and formerly acknowledged as the Western boundary of Nova Scotia, the mark shall now avail, or Whether the stream not marked, shall now by this Board be considered, as the river truly intended as the Boundary between the two Nations.

Perhaps a recurrence to the words of the Treaty of Amity, Commerce &c may give us some aid, on this point. The words are

281 "Whereas doubts have arisen what river was truly
 Terms of Treaty intended under the name of the River St. Croix,
 of 1794 mentioned in the said treaty of peace, and forming a
 part of the boundary therein described," and after proposing the
 forms of procedure for the Commissioners, it is provided that "The
 said Commissioners shall, by a declaration under their hands and
 seals, decide, what river is the River St. Croix intended by the
 treaty."

Had the Governments which made the late Treaty intended to have confined the inquiry of the Commissioners, in the manner as proposed by his Majesty's agent, to the questions of what was anciently the river Saint Croix as mentioned in ancient Documents and by ancient historians, to what was the Saint Croix of De Monts, L'Escarbot and Champlain, or to what was formerly the line between Massachusetts and Nova Scotia, the authority would have been expressed in language suited to those objects. But the two governments considered the Treaty of Peace not merely as an Instrument produced by a cessation of hostilities between two Independent Powers, but as a solemn compact for the cession and security, as well of territory, as of sovereign dominion. And therefore whatever errors may have happened, or mistakes have taken place, they can never be corrected by a Judicial Tribunal, which acts under the solemn obligation of an oath to decide, not what Treaty ought to have been

made, was intended to have been made, or would have been agreed to, on an adequate understanding of the subject, but to decide impartially, according to such evidence *as shall be respectively laid before them on the part of the British Government and of the United States, what river was truly intended.*

Here then we come to the only question, within the cognizance of the honorable Board, to wit,—What river was intended by the Treaty of Peace, as the river Saint Croix?

This mode of expression is equivalent to saying, what river the Commissioners intended to make the boundary between the two nations. The mode of investigation proposed by the Agent for his Britannic Majesty is, not to find what was in fact intended, but what, under all circumstances, ought to have been intended as the boundary. The Agent for the United States contends that if any error has taken place in the Treaty of Peace, it ought to be corrected by Negotiation, and not by judicial proceedings. That where there is positive evidence, or circumstantial facts to afford satisfactory proof, of what river the Commissioners agreed to, marked and designated as the boundary, the nations are bound by it, under all Judicial proceedings, until a new Treaty shall change the fact, and correct the error.

Meaning of
phrase "truly
intended," in
Treaty of 1783 282

The Agent for the United States, goes still further and maintains—that if the Commissioners had in their minds a river, which had never been called by the name of Saint Croix, or if they had fixed their eyes upon the Kennebeck, the Penobscot, or the Saint John, and marked either of those rivers as the boundary upon an idea that it had been called the Saint Croix, or had been known as the boundary between Massachusetts and Nova Scotia, no one would deny that that was the river truly intended, as a part of the boundary therein described.

The argument on the side of the British Government on this point, if it amounts to anything conclusively, it must be this: That men, where they act voluntarily, but mistake one object for another, can have no intention at all. That if the thing or object, upon which the will is fixed, in exclusion of all others, is not that which on a due and full degree of information would have been selected, that then no intention of the mind can be applied to it.

But it is very clear, in Theory and Practice, that the intention of the will may embrace a wrong as well as a right object. A man may fully exercise his intention by living in Neapolis, under a mistaken idea that he resides in Carthage, and no one can say that he does not live there intentionally. When the mind accepts one object, conceiving from its appearance that it is another, it is true that this is not 283

the one which was wished or expected, but yet it is that which was intended, under the present circumstances, to be received.

The question is not, which was the river intended to have been fixed upon and established as a boundary by the Treaty, but which river is intended by the Treaty, or in other words, which is the river truly agreed upon by the Treaty of Peace.

Suppose that the Commissioners who compiled the treaty of Peace had agreed to form a boundary of Territorial Dominion upon a river, which had been known by the appellation of the Saint Croix, but, not knowing the exact place of that river had personally repaired to the Country on the intended borders of the two nations, and had there marked and designated by the name of Saint Croix, and as a boundary, a river which had never before been called by that name, could there be any pretence for insisting that such was not the river Saint Croix by them intended? We can apply the principle contained in this question, in this way. The Commissioners contended for divers rivers as suitable for a boundary, each of which might have been called by the name, given by them, to the one finally agreed upon. They finally agreed to a river, noted on the plan of Doctor Mitchell, as the boundary and called that river the Saint Croix. Now let that river be where it may, it must be decided to be the river Saint Croix intended by the treaty.

284 A great number of examples might be resorted to, for the purpose of illustrating the distinction on which this argument is rested.

A man has it in his resolution to purchase a jewel of a peculiar species, but is imposed upon by a Bezoar-stone, when he expected that he was purchasing a Diamond. Yet, when the bargain was closed he truly intended to purchase that same substance—tho' he was deceived in regard to its quality. The thing purchased, the object embraced, or the place agreed upon, is what the parties intended, but what they would not have intended, if proper information had been within their possession.

One would have been fully justified, in conceiving from the testimonies of M^r Adams and M^r Jay that there was no room for the sentiments advanced by the English Agent on this point. Both these Gentlemen declare that the Commissioners who made the peace agreed upon a river, which they marked on Mitchell's map. That the river so marked was the river truly intended as the boundary, by the name of the river Saint Croix, and upon one of the Interrogatories proposed, they testify that there was no reserve made or thought of by the parties, or any intention expressed or implied or conceived to change that boundary, on any occurrence whatever.

The Agent for the States will not consume time by dwelling on a point, on which he conceives that the controversy cannot in any measure depend. Therefore leaving this question, he will proceed to the next proposed in his arrangement. Whether there is not full proof, that the river Magaquadavie was the river intended by the Treaty of Peace, as the river called therein, the river Saint Croix.

It may be natural here, to divide this inquiry into two parts, viz. First. Whether any river in particular, was designated by the Commissioners who formed the treaty of peace. 285

Secondly. If there was no river marked and designated, but the question was left open to a future discussion, what river should be the boundary, as having been before known by the appellation of the river Saint Croix; whether there is not full evidence that the river now contended for by the United States was the river intended. The Magaquadavic the river intended

There has been so much heretofore said, in relation to the first part of this inquiry, that there can be now no necessity for being prolix upon it.

The Commissioners who formed the treaty of Peace were not upon the Territory then to be separated as to its sovereignty and dominion. Had they been on the Bay of Passamaquoddie and stood either on the Bank of the Scoodiac, or the Magaquadavie and there set up a monument, declaring that to be the river intended in the Treaty, there could be no doubt but this would be admissible and conclusive evidence under the form in which this process is had. Was there evidence that this had been done on the banks of the Scoodiac, the Agent for his Majesty would not have felt the force of Vattel's principles, against extrinsic evidence, in the construction of Treaties, in so sensible a manner as he now appears to feel it.

There is evidence under the eye of the Board of the same nature, and nearly as forcible as the evidence above supposed. The map of D^r Mitchell was before the Commissioners. They marked and designed the boundaries between the nations, on that map, as is proved by the testimonies of two of the Commissioners. And if there is a river on the face of the Globe, answering so nearly to the one by them marked on that map, as to satisfy the Board that that river, or a river nearly to where that river is, was intended, it must fix the fact beyond the reach of litigation.

On Mitchell's map, two rivers only are exhibited. That plan was the guide in the Treaty, and the river intended for a boundary was marked on it.

If there is no such river in nature, as is there represented, then there was no river agreed upon, and the controversy cannot be closed by this Board, but must be referred to a National cabinet negotiation.

But if there can be a river found, which is believed to be what is there marked and designated, that river must be considered as the one truly intended by the Treaty. And from the testimony in the case it fully appears, that the river next to the Saint Johns was the river which was agreed upon as the boundary.

Governor Jay, who was one of the Commissioners, Testifies as follows.

That, in the course of the said neg[oc]iations, difficulties arose respecting the eastern extent of the United States; that Mitchell's Map was before them, and was frequently consulted for geographical information; that in settling the eastern boundary line (described in the treaty), and of which the River S^t Croix forms a part, it became a question which of the rivers in those parts was the true River S^t Croix, it being said that several of them had that name; that they did finally agree, that the River S^t Croix, laid down in Mitchell's Map, was the River S^t Croix, which ought to form a part of the said boundary line. But whether that river was then so decidedly and permanently adopted, and agreed upon by the parties as conclusively to bind the two nations to that limit, even in case it should afterwards appear that Mitchell had been mistaken, and that the true River S^t Croix was a different one from that which is delineated by that name on his Map, was a question or case which he does not recollect nor believe was then put or talked of.

By whom in particular that Map was then produced, and what other Maps, Charts and Documents of State were then before the Commissioners at Paris, and whether the British Commissioners then produced or mentioned an Act of Parliament respecting the boundaries of Massachusetts, are circumstances which his recollection does not enable him to ascertain. It seems to him, that certain lines were marked on the copy of Mitchell's Map which was before them [the Commissioners] at Paris, but whether the Map mentioned in the Interrogatory as now produced, is that copy, or whether the lines said to appear in it are the same lines, he cannot without inspecting and examining it, undertake to judge.

To the last interrogatory he answers, that for his own part he was of opinion, that the easterly boundaries of the United States ought, on principles of right and justice to be the same with the easterly boundaries of the late Colony or Province of Massachusetts.

Although much was said and reasoned on the subject, yet he does not at this distance of time remember any particular and explicit declarations of the Parties to each other which would authorize him to say that the part of the said line (described in the treaty) which is formed by the River St. Croix, was mutually and

clearly conceived and admitted to be also a part of the eastern boundary line of Massachusetts.

He doubts there having been then very clear conceptions relative to the just and precise easterly extent of Massachusetts; for he has reason to believe, that respectable opinions in America at that time considered the River S^t John as the proper eastern limit of The United States.

That a copy of Mitchell's map was before the Commissioners at Paris, is proved by the testimony of the President of the United States. Governor Jay's testimony, with his, proves that the river marked on that copy, by the name of the S^t Croix, is the river then agreed to and truly intended. The marks on the map now before the board corresponding with their recollections, shew that there can be no possibility of their being mistaken—nor any well grounded pretensions, that any other river was intended by the treaty as forming a part of the boundary. There is no other than the Magaquadavie river that can be considered as there represented, under the name of Saint Croix.

The mouth of the Magaquadavie is placed on that map near where that of the Degadequash in fact is; but no one will believe that the river last mentioned is laid down and the first omitted, or that the inconsiderable Brook, called the Degadequash, was ever called the S^t Croix, or intended as forming a part of the boundary.

Upon the second point, it was proposed to consider, if there was no 288 river marked and designated, but the question left open to discussion what river should be the boundary, as having been before known by the appellation of the river S^t Croix,—Whether there is not full evidence, that the river now contended for by the United States was the one intended.

This important investigation may be made with more facility, by inquiring whether that river was anciently called by the name of the Saint Croix, and by attending to its appellation, before the American Revolution, as well as since that important event was accomplished.

In this mode it will be very natural to consider the testimony of the native Indians, before any other evidence or circumstance shall be attended to. This is positive testimony, and the circumstances brought to view are intended to corroborate and support the important and decisive fact, which is contained in it.

If there was a doubt remaining on the positive evidence, that the Magaquadavie was the river designated and marked by the Commissioners, who made the Treaty of Peace, as a boundary, there are a variety of circumstances which would lead the board to conclude that river to have been intended. Many of these have been mentioned,

some of them repeated, and there are yet others to be attended to. These will come naturally under the second point proposed.

This question may be contemplated in two points of view. Whether, the river contended for by the American States, was *anciently* called the Saint Croix, and whether, if it was not, a modern appellation will not justify the assertion that the Commissioners intended that river in the Treaty.

- 290 The agent for the United States entertains the idea
 Local usage: of there being a propriety in his considering the testi-
 Indian testimony mony of the native Indians, first upon this point.
 The testimony is in these words:

- 290 *The testimony of Captain Nicholas Awanwas, aged 67 years, Thomas Louis aged 28 years, Joshua John Thomas aged 36 years, John Batiste and Francis Nicholas aged 22 years, Anthony, aged 23 years, John Thomas aged 20 years, and Gabriel, aged 21 years, Indians of the Passamaquoddy and Machias Tribes, produced as witnesses on the part of the United States, and sworn and examined, in the presence and hearing of each other before the Commissioners. John Batiste a white man being sworn as Interpreter*

SAINT ANDREWS Oct^o. 7th 1796

- 291 Captain Nicholas Awanwas, saith that the Indians called the Bay beyond Deer Island, *Sea*, and from Deer Island, to Saint Andrews they called it bay—that the Indians call the Megagwadavy, Saint Croix—that he has heard no other name for the Megagwadavy, than Saint Croix, since he was a boy—that there is but one cross, by which he means that the French put up only one cross—that the French gave it that name—that the Indians call the waters, from Brewer's upwards, Schootuck, because they go up the rapids—that there is no river called Passamaquoddy, but that the whole bay comprehending the Megagwadavy, the Schootuck, and the Diggitygwash is called the Passamaquoddy; that there was a cross put up at Saint Andrews point and it was standing until about fourteen years ago and was put up by Saint André a priest—that the first Cross was at Megagwadavy and two days after a Cross was put up at Saint Andrews point, and then it was called S^t Andrews—that they were not the same cross and whenever a cross became rotten the priest put up another—that he never heard the point now called Saint Andrews point, called point Saint-Louis—that the French were the first white people, who settled at Saint Andrews—That the Indian name of the little Island near the Devil's-head, is Muttanagwis, and the name of the great Island there is Muttanagwamis, which signifies a place like a *store* or *chest*—that there was a fort on the great Island—that he has understood the French first landed at Megagwadavy, and then they

¹ Pp. 292 and 293 are blank.

came to Saint Andrews Point and then they went to Muttanagwamis—that the first time the French came there, were two vessels, and one remained here, and when they came again, they found that all the men who remained had died and the vessel which came the second time, finding that all the men who had remained were dead, went away—that he has seen a cross which had been put up at the Schootack, at the carrying place,—that he has not ever known the Schootack called the Saint Croix—that the branch of the Schootack which runs Northward, is called Cheputnatekook, that Schootack means a place which has been burnt—that the lakes shewn to him on the Maps are generally called Schootack-lakes, but have also particular names. The other seven Indians severally said, that as far as they respectively knew, or had heard, the matters as testified by Cap^t Nicholas Awanwas, were substantially true.

I, John Fountain of Indian Island, in the bay of Passamaquoddy, 294
aged sixty seven years, do testify and declare, that I have resided in said Passamaquoddy (most of the time) for twenty nine years—that I have been well acquainted with the Passamaquoddy tribe of Indians, and have had frequent conversations with them respecting the River Saint Croix—that they always called the Magaquadavic the S^t Croix particularly Bungawerawit, Louis Neptune, John Battist Neptune, and John O'Denny, chief men of said tribe—that the white people with whom I have been acquainted in this part of the Country, always called the Magaquadavic, the S^t Croix river—and I do further testify and declare, that I never heard any person call the Scoudiac, the Saint Croix.

Questions by Robert Pagan and Joseph Garnett Esq^r.

295

1st How many years ago did you hear Bungawerawit, Louis Neptune, John Battist Neptune and John O'Denny call the river Magaquadavic the Saint Croix?

Answer. Between twenty and twenty nine years ago.

2^d On what occasion did you hear them call it so?

Answer. Upon no particular occasion but generally, upon their going to or coming from the Magaquadavic, and frequent conversations which I had with them.

3^d What white people whom you have been acquainted with, did you hear call the Magaquadavic, the Saint Croix, above twenty years ago?

Answer. James Chaffey, Joseph Connick, William Clark and 296
others whose names I do not recollect.

4th On what occasions did you hear them call it so?

Answer. I do not recollect.

5th Where did you begin your settlement when you first came to this part of the Country?

Answer. At Indian Island.

6th What government did you then suppose yourself under?

Answer. Under the government of Nova Scotia.

7th Did the inhabitants and strangers at the time you came to Indian Island and since, resort to Scoodiac falls, for the purpose of catching alewives?

Answer. Yes.

8th Do you know of any other river in Passamaquoddy bay, where inhabitants or strangers have resorted after fish?

297 *Answer.* I do not.

9th Do you know or have you heard that Grampuses, or whales go up Scoodiac river?

Answer. I do not, nor have I heard that they do.

10th Where is Passamaquoddy Harbour?

Answer. I think its entrance, is by Head Harbour.

11th Is there any other entrance to it?

Answer. Yes, by West Quaddy.

12th Is there a bar to the passage by West Quaddy?

Answer. Yes—below Flaggs.

13th Do you know if Grampuses and Whales resort between West Quaddy passage and Head [Head] Harbour?

Answer. Yes—I have seen them there between Moose Island, Dudley Island and Sowards neck.

298 ¹ 14th Where is Passamaquoddy river?

Answer. I suppose it is from Head Harbour, up as far as Scoodiac.

Question. Did you ever know of any determinate line of Jurisdiction, between the Provinces of Massachusetts Bay and Nova Scotia?

Answer. No.

300 I Francis Joseph of the Passamaquoddy tribe of Indians, aged forty six years do testify and declare, that in this present year of Our Lord seventeen hundred and ninety seven, I am acquainted with all the Passamaquoddy tribe of Indians and others who have resorted there,—That the French about four hundred years ago, came to this part of the Country with one vessel—That they first came to Head Harbour, and harbour Letang; and from thence went up the river Magaquadavic, in a boat, where they saw some Indians. That not liking the land, they came down the river and erected a cross at its mouth, and then returned to France,—That the next time, the French came here in four vessels and sat down at an Island, near Devils-head, where a malady assail'd them by drinking bad water, of which a great number died and the rest returned to France. The island on which they sat down is called Matnagevish. It was called so, because they left their [stores] &c. there when they went a hunting, as no bears or other wild beasts sat down there. The little Island near it is called Negwimish—And this deponent further testifies, that the French and Indians always called the river Magaquadavic, the Saint Croix, and they never called the Scoodiac river the Saint Croix.—That I always heard my Grandfather Bungawarawit, John Baptiste Neptune my father,

301

¹ P. 299 is blank.

Louis Neptune my uncle, John O'Denny, and all the other Indians, call the Magaquadavic river the Saint Croix and that I never heard any of them call the river Scoodiac the S' Croix. And this de- 302
ponent further testifies that the Scoodiac river, from its mouth to different carrying places, into Machias river, Penobscot river, and Saint Johns river belongs exclusively to the Passamaquoddy tribe; and that the Magaquadavic, is all one common, and that Indians of different tribes have a right to Hunt there when they please.

his
FRANCIS X JOSEPH
mark

WASHINGTON SS. PLEASANT POINT Nov. 9. 1797.

The within named Francis Joseph, chief of the Passamaquoddy tribe of Indians, affirmed the within Declaration, by him sub- 303
scribed to be the truth, but refused to make oath to the same, because the French priest was not present to administer the oath—the said Declaration was made, in presence of Robert Pagan, Joseph Garnett and Phineas Bruce Esquires, and fifteen indians.

Before me

JOHN BREWER
Justice of the peace

[Copy]

The justice of this controversy will be greatly promoted by the 304
appearance of those natives before the Board. The deep respect which they appeared to have for the Truth, the high sense they entertained for the obligation of an oath, and the cautious correctness with which they gave their testimonies, cannot fail to impress the mind with the fullest credit to the facts they verified. It might be further added, that they were under no possible temptation to favor the American side of the question. The intercourse which the Agent of the United States had with them was altogether in the presence of the Board, excepting the letter which he wrote to invite their attendance, and which has its place in the Journals, and is verified, as the only one he wrote, by the manner in which it was produced by a *Sachem* in the presence of the Commissioners.

On the other hand, their dependence is entirely upon the people of New Brunswick, who had frequently conversed with them on the subject of this controversy, in such manner as interested men generally converse with men who are their dependents, and whom they wish to convince of errors against their interest. But the natural uncorrupted feelings of men in the purest simplicity of circumstances, who want but little, and realize that they shall not want that little long, chained the feelings of their hearts to the Truth.

The agent for his Majesty treads lightly over this important testi-

mony, but the Agent on the other side views it with a wish that others would pay something more than a superficial attention to it. It is impossible but that it should demand a careful examination and a very high degree of attention and respect.

305 The Indians, excepting two, have given their testimonies personally before the Board, and the manner in which they gave their evidence was duly observed. The deposition of Francis Joseph, the Captain, or Sachem of the Passamaquoddy tribe, was not then obtained because he was sick. His evidence has been since taken and is now exhibited with the others. The honorable Commissioners will be pleased to recollect, that they frequently heard the Magistrates and Gentlemen of Saint Andrews declare, that this Sachem was a man of uncorrupted and correct morals—that whatever he should say must be relied upon with the utmost confidence, and that no man of any nation, or of any colour ought to be preferred to him in point of veracity.

This man gives some facts which are of importance to be considered alone, as they are such as are not recollected by the other natives.

He declares that the country, including the Scoodiac river westward to Penobscot, has always belonged to the Passamaquoddy tribe; yet the agent for his Majesty has his doubts, whether ever the Scoodiac river, which was within the territory of this tribe, was called Passemacodie.^a The Indians might not call it by that name, but the Europeans and white people who came there to trade would naturally call the river by the national name of the people in whose country it was found, until they had discovered its particular name amongst them. Hence we find on the first maps of the English, that the waters between Moose and Deer Island and between these and Campo Bello, were called Passemacodie. Some of the Indians say in their testimony, that this appellation signifies—the place where Pollock are taken. But there is no pretence that the tribe of Indians there took their national name from a circumstance of this kind; or, if there was such a conjecture, a good argument would arise from the fact that the waters up, as far as the tribe held the lands, might be called by the same name. It cannot be pretended that the Indians there have lately assumed the name of the Passamaquodies; they are mentioned by Douglass who wrote in 1747, vol. 1, page 320, by the name of Pasamaquady Indians.

306¹ The argument on the other side, that the river marked on the maps

^a Hutchinson, 2 vol. p. 144, says, Church went up the west Passamaquady and took French prisoners and killed French people in 1704; this [is] good evidence that there was a river of that name, ninety years ago.

¹ In record copy p. 387 follows p. 306.

as the Passamaquody is the Cobscook, has no other colourable foundation than this, that Pollock are taken there, and none in the Scoodiac; and that the appellation implies something of that nature. Awanwas and the other Indians declare, that no river is called the Passamacodie, but that the whole bay, comprehending the Scootuck, the Magaquadavie, and the Degadeguash, is called by that name. That the waters without Deer Island were called *Sea* and within were called *Bay*—yet the English have always called the waters without Deer island, and between that and Campo Bello, by the name of Passamacodie River.

The testimony of Francis Joseph differs somewhat from that of the other Indians, as to the tradition of the French people coming to the Country. But this serves rather to corroborate than to discredit his or their evidence. Where there is a formal or unintentional difference in the testimonies of witnesses, it is always considered as a mark of integrity, and shews that the witnesses have not entered into a combination to give evidence in favor of one side more than the other.

The names and characters of the people from whom he obtained his information, in regard to the tradition, will be attended to, when we come to compare the evidence founded on facts which have taken place since the year 1760.

One of these natives, who is seventy years of age, and who is remarkable for the sobriety of his life, and his strict regard to the moral virtues, declares, that the tradition in their Nation has always been, that when the French people came first to their shores, they went into the mouth of the Magaquadavie, and there erected a Cross, and called the river the Saint Croix, or the river of the holy cross, from that circumstance. That after this was done, they came to the two islands Muttanaguis and Muttanaguamis, and there 387 wintered. All the other witnesses of the same nation confirm the important facts contained in this Testimony.

The Agent for his Britannic Majesty appears to treat the tradition of these natives with neglect, if not with contempt. But whoever knows anything of the history of unlettered nations, and is not biased by motives of interest, will always be ready to acknowledge, that their tradition is as much to be depended upon as ancient, if not as modern history. The objects for the memory of the Indians are very few. Those of so singular a nature and so important as the fact under consideration, must make a deep impression and hold a first place in their memory and conversation. Every instance of war, every treaty of peace, every act of traffic, every step in the

progress of the arts or Agriculture, and every recollection of the difference in the dress, colour, and manners of the Europeans and Savages, raises the question from the children to the parents, from the young man to the old. Where did these people obtain their different form and manners? Where were they made? And when, and how, did they arrive on these shores? It is quite impossible to suppose that under these impressions the circumstance of the first arrival of the white people should not be handed down, for a century and an half, with the most minute correctness.

The Agent for His Majesty, to detract from the testimony of these witnesses, urges the circumstance of a Cross having long been erected on the point of Saint Andrews.

The fact is, that there is a Burying place of the Native Indians where that Cross has stood, and the evidence in the cause fully substantiates it to be the custom of the Indians to erect a Cross on all the places which they separate for depositing the remains of their dead. There having been a Cross for an hundred years on the Point at Saint Andrews, cannot afford one tittle of evidence that De Monts did not erect one on the bank of the Magaquadavie in 1604. It is conceded in this Argument, and fully proved, that De Monts coasted along the shore, came into G[r]and passage on the east side of Passamaquodie bay, and anchored first in the river on the East side of it, and by this concession and proof, the facts contained in the Indians' evidence is established beyond a foundation for a controversy.

- 388 The Map made by Mons^r L'Escarbot, and annexed to his book, was intended to give his readers of the French Nation a general idea of the voyage of De Monts, (in whose favor he expresses a very great interest,) and of the situation of the whole of New France. But his map, whilst it exhibits circumstances which may aid the justice of the present controversy, must be considered as but a sketch, or rough representation of the country. The bay of Fundy was not so well explored at that time, as the bay De Verte and the bay Chaleurs. The river Hochelaga or Canada, which was better understood than the Wilds of Acadie, is laid down tolerably well, but without any considerable degree of exactness.

Local indicia
in maps

L'Escarbot, and Champlain, both mention three rivers, as coming into the bay of Saint Croix; and the representation of the former, in his Map, was to give a general idea of De Monts' voyage, as well as of those Rivers, and of the bay called the bay of Saint Croix. There appears to be no doubt, but that the Frenchman entered into every

River from Saint Johns Westward. He was on a Voyage to explore a new discovered country, where diamonds, and mines of Gold and Silver, as it was then believed, were deposited by the hand of Nature; no river therefore could have been passed unnoticed. It is indeed a yielded point, that he entered into a river on the East side of the Bay, before he repaired to his winter quarters.

The Commissioners have been on those waters, have crossed the bay on the East of Saint Andrews point, and have been through that entrance on the East side thereof, which is called by the French the Grand Passage. It will be in vain then, for the Agent for His Majesty, to urge them to believe that De Monts, on a Voyage of Discoveries, would pass by that extensive and beautiful bay, without searching for the rivers which empty their waters into it, and without traversing it to its utmost influx. The river Magaquadavie at its mouth is deep, wide, and beautiful. How then can it be supposed that this river was passed without notice? And if it was noticed, and was the first port in that bay in which the adventurers rested, it would certainly have a place in their conversations, Maps, and writings.^a 389

The river, as it appears on actual survey, runs from the North Eastward, as far as from the place where the tide flows from the sea into it. The Eastern river on De Monts' map has that appearance. The Western river he exhibits comes from towards the Penobscot, and the middle river can have no regard to any other than the North branch of the Scodiac, or waters called Oak bay. Perhaps it may be said that these three rivers appear to meet at the same point, and therefore cannot be a representation of three rivers, one of which is on the other side of a wide bay, and more than thirty miles from the forks of the others.

This same argument is as forcible against the position [of] the other side. For if the plan represents the Cobscook, and the two branches of the Scodiac, the former is as far from the forks of, or the point of the meeting of, the other two as the Magaquadavie is. Besides this, if the Cobscook is laid down as one of the rivers, it must be that one which appears as coming from the branch of the Penobscot, and the South branch of the Scodiac appears as coming from the North. On the East side of the Bay, and on a river coming into it from a North Easterly course, he places the words S^t Croix, with an evident 390¹

^a When we enter the bay through the Grand passage we can by no means discover the Scodiac. And when we advance up the bay, even to the head leaving S^t Andrews on the West, we should not suppose a river where the Scodiac is found. There can then be no foundation for a conjecture that De Monts passed by the Magaquadavie without staying to explore it.

¹ Pp. 391-3 are blank.

intention to shew that the river Saint Croix, the place where De Monts first cast his anchor in those waters, is on the East side of the Bay. Had those words been thus placed on the West river exhibited in the map, the Agent for his Majesty would have embraced it as plenary and satisfactory proof, independent of all other evidence and circumstances, that the West branch of the Scoudiac is the Saint Croix of De Monts, L'Escarbot, and Champlain. But the Agent for the United States offers it as evidence in corroboration of the positive testimony, which he has before exhibited to maintain his position, that the Magaquadavie was originally called the Saint Croix.

There is one observation more which demands a place under this head, that is, that De Laet reports from Champlain, and Champlain from L'Escarbot, that when you sail from the Island of Saint Croix for Pentagoet, you pass by a great number of Islands. In the Map under consideration L'Escarbot has given us the Islands spoken of, and placed them in the way from the Mouth of the Magaquadavie to the Westward, between Deer Island and Moose Island.

394 It is said that the plan means to represent the two branches of the Scoudiac, and a small Creek or Inlet on the head of Oak bay. Then the same difficulty is again seen, that the three rivers appear to meet at the same point, although the forks of two of them are twenty miles from the mouth of the third. The Creek or Brook on the head of Oak Bay, which nothing but the piercing eye of an hungry Indian would notice, is to have a place on L'Escarbot's map, when the river, which makes an appearance of importance, on which the Savages might be expected to come from the internal parts of the Country, with furs for traffic, and which was undoubtedly the first harbour made by De Monts in the bay of Passamaquodie, is to remain unnoticed.

The distance from Saint Johns to Passamaquodie-bay, and the forms of the shores there, are not accurately exhibited in that map.

Two of the three streams represented can never be supposed to be the two brooks spoken of as coming in above the Isle De Saint Croix, because that would at once shew that it was not intended to represent any rivers at all.

When the map of L'Escarbot is viewed with a candid and impartial eye, it will appear, that by the body of waters there represented, on which the words Saint Croix are marked, he intended the bay of Passamaquodie, and intended to represent therein the Magaquadavie, and the North and South branches of the Scoudiac. He could not
395 intend the Cobscook by either of these, because he has laid down Moose Island at the mouth of the bay, in its natural position, and

though the mouth of the Cobscook is near by, and South West of it, yet he places his three rivers at a great, and all of them at an equal, distance from that Island.

Deer Island, the Island laid down by him, Moose Island, and the others are in the mouth of the bay as near to their natural order as any of the shores or rivers appear to be in his map.

In the map of L'Escarbot, there are two large Islands which are clearly intended for Deer Island and Moose Island.

Whoever compares his map with that made by Des Barres, will see this to his full satisfaction. He will further see, that these Islands are intended as well from their comparative bigness, as from their place amongst the small Islands, near to which they are seen, to be Deer Island and Moose Island.

Between these and the forks of the three rivers is a distance in which no Islands are seen, until two are found as placed near the branches of the rivers. The same space may be observed in Des Barres map, between Deer and Moose Island, and the Island of Saint Andrews, and Thompson's Island, one on the South, and the other on the East side of the Point.

Although this Map, as has been already observed, is far from being a perfect representation of the bay, yet it cannot but be acknowledged that the Magaquadavie holds a distinguished place upon it, and is marked as the river Saint Croix.

It may now be proper, to assume the consideration of the positive 396 ¹ testimony offered on the part of the British Government, to prove the river Scoodiac to have been, since the reduction of Canada by the English Nation, called, or known by the name of the river Saint Croix.

Review of British
testimony

The Agent for the United States will exhibit copies of the depositions taken by the Agent for his Britannic Majesty; and having made such observations on the same as shall appear to him to be proper, reasonable and necessary, will offer and compare the testimonies of several witnesses, sworn at the instance of the United States, with the evidence produced on the other side.

*Interrogatories administered to Thomas Wright Esq^r a witness 400
produced sworn and examined on the part of his Britannic Majesty
under the authority of the Commissioners appointed
pursuant to the fifth article of the treaty of Amity,
Commerce and Navigation concluded between his
said Majesty and the United States of America on the 19th day of
November 1794, to decide what river is the river Saint Croix truly*

Deposition of
Thomas Wright

¹ Pp. 397-9 are blank.

intended under the name of the river St Croix by the Treaty of Peace between his said Majesty and the said United States, and forming a part of the boundary therein described

401 *First Interrogatory*—Look upon the plan now produced to you entitled “A plan of Passamaquoddy-bay and Islands including a part of the adjacent sea coast, and Grand Manan Island with its appendages,” and declare whether or not the same plan is a true copy of the plan of the original survey of which the same purports to be a Copy.

Answer. I have look’d upon, compar’d and carefully examined the plan now before me entitled “A plan of Passamaquoddy bay and Islands, including a part of the adjacent sea coast and Grand Manan Island with its appendages” and declare it is a true copy and upon the same scale of the plan of the original survey made by me in the summer of 1772—all of it except that part of the Sea Coast included between the Seal Rock at the entrance of West Passage, south-westward to little river; which part was surveyed
402 about the same time by another assistant to Samuel Holland Esq^r Surveyor General of the northern district of North America.

Second Inter^y. Whether or not were you employ’d in any and in what Capacity, at any and at what time in making the said original survey, together with any and what other Person or Persons, under any and at what authority?

Answer. I was (in consequence of an appointment) employed as a Deputy or assistant Surveyor to Samuel Holland Esq^r Surveyor General of the northern District of North America and in that capacity accompanied him from England at the commencement of the service in the year 1764. The above mentioned survey I
403 undertook and completed in obedience to a written order now before me and of which the following is an extract “Portsmouth New-Hampshire 27th April 1772. This is to desire you will at that time be ready with your party to embark for Saint Johns River in the Bay of Fundy and on your arrival there you will survey the Harbour of that River and then proceed Westward surveying the Coast Islands &c Signed Samuel Holland. To Thomas Wright Esq^r one of his Majesty’s Deputy Surveyors of Lands for the northern district of North America.”

On this service I was accompanied by Lieu^t Thomas Hurd of the British Navy then an Officer of his Majesty’s armed ship the Canceaux and who was appointed by Captain Henry Mowat (Commander of said Ship) to accompany me in the said survey and to take the soundings thereof with other nautical remarks.
404

Third Inter^y. Was the Scoodiac which was marked in the said plan as the Great River St Croix called by the name last mentioned at the time the said survey was made?

If you declare by whom the said River was so called, and whether at that time you received any and what information from any and what Person or Persons that the said river Scoodiac was so called?

Answer. The river Scoodiac was called the Great River Saint

Croix at the time I made the above mentioned survey, and this (besides my remembering it to have been so named) I find confirmed by a minute thereof in my original field Book of the said survey now before me. 405

I obtained these names together with others expressed on the plan of my survey from the then resident Inhabitants of the District and I believe was much aided therein by a Mr Munro or Moreaux (for the name is both ways spelt in my field Book) a very intelligent person who resided on Campo-Bello Island in the capacity (as I understood) of Agent to a Company of Liverpool Merchants then Proprietors of the said Island. I have the greatest reason to suppose that the said Munro or Moreaux furnished me with most of the names affixed to my said Plan from frequently having encamped near his house during the survey and consequently being much in his Company; also from his having furnished me with upwards of Two Thousand Indian words with the English to each, and which are (as I then took them down) in my said field Book now before me. 406

Fourth Interog. Whether or not were you informed at that time by any and what Person or Persons that the river Scoodiac had for any time and how long before been known by the name of S^t Croix river or that the said river Scoodiac was the true and ancient river S^t Croix eminently so called.

Answer. To the best of my recollection I was not (at the time of making said survey) particularly informed by any Person or Persons, that the said River Scoodiac had for any time or space of time been known by the name of S^t Croix river; or that the said river Scoodiac was the true and ancient river S^t Croix; Neither do I remember that there was anything passed thereupon; it is not likely there would upon such a subject, when it is considered that the whole Territory on every side of the rivers now in dispute was of the Dominions of Great Britain, and at that time likely so to continue. This consideration tends further to shew, that there could have been no inducement whatever at that period of time for calling the river Scoodiac the Great river S^t Croix in preference of any other name had not such its name preexisted. The fact is (as before stated) that I took the name of the said River (in like manner as of every other place that I surveyed and was a stranger to) from the Inhabitants of the District; and that the said river was generally known by the name of the Scoodiac or Great Saint Croix River; no Person then saying to the contrary as I recollect; it was a matter of total indifference to me what names I procured for my plan; so that I obtained them by the best information I could procure whilst making the survey. 407

Fifth Interⁿ.—Declare all you know or believe respecting the said river Scoodiac, as being the true and ancient river S^t Croix and forming part of the boundary mentioned in the title to these interrogatories with the cause and reasons of such your knowledge and belief. 408

Answer. I always understood as well before as after [at the] 409

time of making the above-mentioned survey, and since, that the river Scoodiac or Great river S^t Croix was a part of the ancient boundary between the British Provinces formerly known by the names of Nova Scotia and Massachusetts-bay, since which a division or Northern part of the first is now called (by Great Britain) New Brunswick, and the latter (by the North American States) goes under the denomination of the district of Maine. Since being summoned to attend the Commissioners appointed as aforesaid, I have bestowed every attention towards informing myself on the subject of their investigation; have perused the several publications of Voyages made by the French to Acadie; their discoveries thereupon and consequent settlements made (by Mons^r De Monts, Poutrincourt, Champlain, L'Escarbot and others) on a small Island which they named Isle de Sainte Croix, called on my said Journal Bone Island, situated in the midst of the river Scoodiac or Great River Saint Croix; I have also critically examined those French Settlers' plan of the said Island handed to me by Ward Chipman Esq^r his Britannic Majesty's Agent &c; have compared it in every particular respecting the situation (as described by the said French Settlers) its measurement, slope &c with that of my said survey made in 1772, and find such the said French description and plan of the said Isle de S^t Croix so very nearly to correspond therewith as to leave me not the least room for doubt that the said Isle de Sainte Croix or Bone Island was the identical spot on which the said Frenchmen made their settlement sometime about or between the Years 1604 and 1614.

There is no other situation to be found in the circuit of the whole bay of Passamaquoddy to which such the said French description of and plan would in the least apply to; so that taking the whole into consideration I have every reason most assuredly to believe that the said river Scoodiac is the true and ancient named river S^t Croix.

SAINT ANDREWS Octo^r 24, 1797.

THOMAS WRIGHT

Surveyor General for the Island Saint John.

- 412 *Interrogatories administered to Thomas Wright Esq^r by Phinehas Bruce Esq^r acting on behalf of the United States of America*

First Interrogatory. Is the Extract which you have made in your answer to the second Interrogatory, put to you by Ward Chipman Esq^r the substance of the instructions you received from Samuel Holland Esq^r relative to the survey you were to make from the river S^t Johns Westward in the year 1772?

Answer. The extract here referred to is the full substance and all that relates to the Instructions I received from Samuel Holland Esq^r respecting the survey I was to make westward from the River S^t Johns—

- 413 *Second Inter^y.* Did John Moreaux (the Person mentioned in your answer to M^r Chipman's third interrogatory) hold any

appointment under the Government of Nova Scotia at the time you received your information from him in 1772?

Answer. M^r John Moreaux I believe held some Office in the Custom-house; under the Government of Nova-Scotia in 1772, but what that Office was I do not recollect at this distance of time.

Third Interrogatory. At the time you made the before-mentioned enquiry in 1772 was there any dispute subsisting between the then Province of Massachusetts-bay and Province of Nova Scotia respecting the boundary line between the two Provinces?

Answer. At the time I made the Survey in 1772 I [did] not (to the best of my remembrance) hear of any dispute then subsisting between the then Provinces of Massachusetts-bay and Nova Scotia respecting the boundary line between them. 414

Fourth Inter^y. Did you receive your information in 1772 respecting the river Scoodiac's being called the Saint Croix river from Persons living under the Government of Nova Scotia?

Answer. The informations I received in 1772 respecting the river Scoodiac's being called the S^t Croix river, I believe were from Persons chiefly residing under the Government of Nova Scotia; as the People in that Neighborhood seemed to think themselves under that Government.

THOMAS WRIGHT

Surv^r Gen^l of the Isle^d S^t Johns 415
SAINT ANDREWS Octo^r 24 1797—

SAINT ANDREWS COUNTY OF CHARLOTTE SS.

On the twenty-fourth day of October, one Thousand Seven Hundred and Ninety-seven the above named Thomas Wright Esq^t personally appeared and made Oath to the truth of the foregoing deposition by him subscribed. Robert Pagan and Joseph Garnett Esq^{rs} were notified and present at the taking of this Deposition.

Before us { JN^o CURRY J. P.
DAN^l M^eMASTER J. P.

[Copy]

Robert Pagan declares that having obtained a plan of Saint Croix Island, said to have been published at Paris Anno 1613, and having compared it with the shores, coves and points of the Island laying a few miles below the mouth of the Scoudiac river at the Devils-head, commonly called Doceas Island, and also with the shores &^e of the main land westward and eastward of it, as laid down in that plan, and having found a most striking agreement between every part of those shores, coves and points and that plan. 416

Deposition of
Robert Pagan

He on the seventh day of this Instant, July, went to said Doceas Island, accompanied by William Cookson, Thomas Greenlaw, Nehemiah Gilman and John Rigby for the purpose of making further discoveries there.

On the North end of Doceas Island wherein the plan above mentioned the several buildings are laid down, he found four distinct piles of ruins, agreeing in their situation and distances from each other with the spot at A as laid down in that plan, and these four piles of ruins are directly abreast of the long sandy point at low water in said plan.

On examining these piles he found them considerably raised above the general level of the ground around them, some parts of them covered with roots of trees and windfalls, and all of them with mould or rotten leaves from six to eighteen Inches deep.

On further examining he discovered distinctly several tiers of stone in each of the piles, laid in clay mortar, one on the top of another. The clay is perfectly distinct from the stone, and of the usual thickness (between the tiers of stone) of mortar made use of in laying stone or brick at this day. In some parts of these ruins, the clay is as soft and perfect, as if newly dug out of a pit, and in other parts appears as clay does in Chimnies where fire has been, and there are evident marks of fire on the stones in many places.

417 In digging he found charcoal in a perfect state, only it was easily crumbled to pieces in handling, he also found part of a stone pitcher in full preservation.

On one side of the piles he discovered a number of bricks so laid together, as to convince him, that a large oven has formerly been built there,—all these bricks are in a tolerable state of preservation.

He further declares—that on the 18th day of this Instant July, being at said Doceas Island on a party of pleasure, with a large Company, part of the Company went with him to view the ruins above described, and on further examination in presence of John Brewer Esq^r, the Reverend M^r Andrews, Daniel M^cMaster Esq^r, John Campbell, Donald M^cLauchlan, Donald Grant, William Pagan, and Thomas Pagan, he uncovered another pile of ruins, distinct from the four piles found on the 7th Instant, which they found to be laid in clay, mortar, with piers of stone, in the same manner as the first four piles are laid.

In digging with a spade for a few minutes near to one of these piles, they turned up a metal spoon, a musket ball, a piece of an earthen vessel, and a spike nail, all of which shew evident marks, of having laid a long time under the surface.

He further in presence of these Gentlemen, discovered in that part of the Island agreeing with the spot in the plan between A and B, a ledge of rocks, extending from the middle of the Island towards the shore on each side a considerable breadth; in many places the rocks are some heighth [*sic*] above the surface, and in other places the ledge lightly covered with earth and leaves.

That this declaration may be more fully understood, he has affixed the plans refered to.

ROBERT PAGAN

SAINT ANDREWS 20th July 1797 418¹

Personally appeared before me Daniel M^cMaster Esquire one of his Majesty's Justices of the Peace for the County of Charlotte, Robert Pagan Esq^t, who made oath to the truth of the declaration contained in the first and second pages of this sheet of paper, subscribed by him.

DANIEL M^cMASTER J. P.SAINT ANDREWS, 21st July 1797

Personally appeared before me Daniel M^cMaster, one of his Majesty's Justices of the Peace for the County of Charlotte, William Cookson, Thomas Greenlaw, Nehemiah Gilman and John Rigby, to whom I read the foregoing deposition made by Robert Pagan Esq^t, each of whom made oath that they on the seventh day of this instant July accompanied said Robert Pagan Esq^t to Doceas Island. That they saw and examined the four piles of ruins, and the bricks mentioned in the said Deposition. That the stones in each of the piles are in piers, and laid in Clay-Mortar as therein described, that these piles are on the North end of the Island, and that they lay opposite to the long sandy point at low water on the said Island.

DANIEL M^cMASTER J. P.

PROVINCE OF NOVA SCOTIA. 420

HALIFAX SS

Charles Morris Junior of Halifax in the Province of Nova Scotia, Deputy Surveyor General, being duly sworn deposeth that he was at Passamaquoddy in the Year of Our Lord One

Thousand Seven-hundred and Eighty-three laying out lands for the Loyalists by order of the late Governor Parr. That during his stay there he was informed by

some of the Indians that the river called the Scoodiac was the Great Saint Croix river and had always gone by that name and that one of them who called himself the Chief of one of the Indian Tribes and went by the name of Colonel Lewis then upwards of Sixty Years old told this Deponent that the Scoodiac was the true Saint Croix and that it extended westerly near the east branch of the Penobscot river and that the Indians had a communication from the S^t Croix with the Penobscot river by the means of a portage of about three miles. This Deponent further deposes that he has been several miles up the Magaquadavie river on the east side the Bay of Passamaquoddy and that he never heard any Indian call that river by the name of the Saint Croix, and this Deponent further deposes that he is not interested directly or indirectly in any lands which can be the least affected by the decision of the present dispute between Great Britain and the United States of America under the fifth article of the Treaty of Amity, Commerce and Navigation, and that he neither holds or claims title to any lands comprehended within the limits of the disputed boundaries.

¹ P. 419 is blank.

Signed, CHARLES MORRIS JU^r D. S. Gen^l Sworn before me at Halifax this 17th day of July 1797. Signed J. BRENTON Ass^t Judge Sup. Court.

I Sir John Wentworth T. L. D. Lieutenant Governor and Commander in Chief in and over his Majesty's Province of Nova Scotia do hereby certify to all whom it may concern that Charles Morris Junior Esq^r whose name is subscribed to the foregoing affidavit is Deputy Surveyor General for the said Province and that James Brenton Esq^r before whom the said affidavit was made is an assistant Judge of his Majesty's Supreme Court for the said Province and that the names respectively subscribed to said affidavit are the hand writings of the said Charles Morris and James Brenton. Given under my hand and Seal at arms at Halifax the seventeenth day of July 1797 in the thirty seventh Year of his Majesty's reign.

J. WENTWORTH

[L. S.]

[Copy]

424 *The deposition of Alexander Hodges of the County of Washington in the Commonwealth of Massachusetts Farmer aged sixty-five years or thereabouts*

This deponent doth testify and declare that in the Summer after the Peace he came down to Passamaquoddy with Joseph Parsons of Old York then in the employ of Robert Gould and Francis Shaw of Boston in the Indian Trade and landed at Pleasant Point the tenth day of August in the Year One Thousand Seven-hundred and Sixty-three and has lived ever since in and about that Neighborhood.

Deposition of Alexander Hodges
[425] That at the time of his arrival the Country was a mere Wilderness—no families were settled in it—they erected a Hutt at Pleasant Point which was the first and only one at Passamaquoddy (one on Indian Island excepted) and thought themselves and the place under the Government of Nova Scotia but how far it went they knew not.

That ever since his knowledge of the Place the waters within the Machias Seal Rocks, Grand Menan and the Wolves, and without Letang, Deer Island, Campo Bello and the main, has been known and called Passamaquoddy Bay. That the waters running betwixt Head Harbour and Harbour Letete westwardly, as far up as, and around Moose Island, Indian Island and a number of other small Islands thereabouts, are known and called by the name of Passamaquoddy or Pollock river that the Bay within and between the Islands and Saint Andrews up to Bockaback and around to Diggedequash Maggaguadavic and Letete is known and called Saint Andrews Bay—that Maggaguadavic Diggedequash, Bockaback, Chamcook and Scoudiac were always known and called by those names and empty into the Bay of Saint Andrews, and that Saint Andrews bay empties itself into Passamaquoddy river at the west-

ern and eastern ends there of Deer Island: that the Scoudiac is by far the largest and most considerable river emptying into Saint Andrews Bay; that he has hunted with the Indians up the western branch of the Scoudiac and has been told by them and always understood it to be the main branch of that river—that Cheputnaticook is a small river or stream emptying into the Scoudiac and goes by the name of Cheputnaticook—that Orange river and Denny's river empty into Cobscook at the falls: and Pennaquam below the falls; and that Cobscook forms a junction with the Passamaquoddy river between Sowards neck and Moose Island, part of which empties itself into the bay of Passamaquoddy at west passage so called and part at head harbour—That the Scoudiac has never been called and known by the name of Passamaquoddy river—that he has always² Passamaquoddy takes its name from the quantities of Pollock caught there; that great quantities of Herring, Shad, and Salmon are taken at the foot of the rapids in the Scoudiac annually in the months of May and June; and that no such quantities are taken in the Magaquadavie or any other river in the bay, at that or any other season and near to any falls, and that the inhabitants upon the Magaquadavie Diggedequash harbour, Letang Beaver harbour and all the different settlements at Passamaquoddy go to the Scoudiac at that season of the year for fish;—as the main fishery,—that the fish cannot get up the falls in the Magaquadavie for spawning—that in the opinion and belief of this deponent, not even an Eel (although they will get up a rock that is any way wet) can get up there. And this deponent further saith, that the river Scoudiac, is known and called also by the name of S^t Croix; and being by far the largest and most considerable river emptying into Saint Andrews Bay as is aforesaid has always been considered by him this Deponent as the true and ancient river Saint Croix.

He further saith that about two years after his first coming to Passamaquoddy, he was at Boston and came down passenger with Robert M^cCowan of Pemaquid, to Passamaquoddy again and on their way put into Pemaquid, where being wind bound they staid for some days: that during that time, from the information received from the said Robert M^cCowan and his partner Alexander Nichols of Pemaquid, he this Deponent believes those persons were the first English who ever came to the Saint Croix on the Alewife-Herring Fishery-business: and had the following from their own mouths, Viz^t, that they had been down prior to that time upon a fishing voyage and Indian trade in search of the river S^t Croix expecting it was a large river of Fishery: that they went east as far as beaver-harbour, where they went ashore and found some shoe tracks—could not tell how they came without it was some deserters from Cumberland or Saint John's. Finding their mistake of the

¹ In record copy p. 427 is followed by 429.

² That something has been omitted here is indicated by the sense, as well as by a cross in ink in the State Department copy. The word "understood" should be supplied, as appears from a quotation of the passage later in the record.—EDITOR.

- 431 river came back and went through harbour Le Tete along to the river Magaquadavic up to the falls expecting that might be the Saint Croix: found their mistake again, it being impossible for fish to get up the falls and none in the river according to their expectations. A short time after they had been there an Indian called Colo. Lewis Neptune came down to them over the carrying place and Robert M^cCowan having the French tongue very fluent asked him if that was the river Saint Croix? he told them no—asked him again if there was no better river of fishery than that? he told them, yes—
- 432 They then asked him on board and gave him a dram; but he seemed very shy about shewing them; however the next morning having given him another dram and M^cCowan continuing to speak the French language to him prevailed on him to go and shew them where the river Saint Croix was, and where they had expected, and were told by him there was plenty of fish. That he then went with M^cCowan from thence (leaving Nichols there with the vessel) through Saint Andrews harbour up to Scoudiac falls; where they found great numbers of fish playing about in the waters &c upon which M^cCowan returned to his partner, and they took the vessel up to Scoudiac where they made a great voyage of Alewives Shad and Salmon. That M^cCowan and Nichols ever after this search and
- 433 information &c considered the Scoudiac as the true Saint Croix, and returned and carried on the fishing there for two years with success and intended to continue it, but a M^r Boyd who claimed the land, threw difficulties in their way and bothered them, whereupon they gave up to this Deponent their empty fish hogsheads left at the rapids, and their log canoe; but not being in circumstances to purchase salt &c and Boyd still claiming the privilege, this deponent declined the business. But this deponent further saith, that it always since hath been a principal river of fishery for Alewives, Shad and Salmon, both for home consumption and exportation, and that no other river emptying into Saint Andrews Bay has ever
- 434 been since his knowledge of the Country, for fish of either of these kinds.

This deponent further saith, that until the spring of 1784, the Indians had a Cross standing upon S^t Andrews point and a place of worship and a burying ground; and that he understood their cross was cut down by some of the people of Saint Andrews in a drunken frolic, and another afterwards erected by the authority there—but they have since made use of Pleasant-point for their place of worship and burials.

- And this deponent further saith that the inhabitants of Moose Island, Deer Island, Indian Island, and all other Islands thereabouts and also of the whole Passamaquoddy settlement, formerly
- 435 considered themselves within Nova Scotia and attended the Courts held on Campo Bello, under that government, and when aggrieved applied for redress to the laws of that Province.

his
ALEXANDER X HODGES
mark

WASHINGTON S^sPASSAMAQUODDY July 19th 1797

Then the above named Alexander Hodges personally appeared, and after being carefully examined and cautioned to testify the whole truth and nothing but the truth, made solemn oath to the truth of the above and foregoing deposition by him signed being first read to him. Taken before me the Subscriber one of the Justices of the peace for the said County of Washington

JOHN BREWER

Interrogatories administered to Alexander Hodges by Phineas Bruce 436
Esquire acting on the behalf of the United States of America

1. Did you ever know an Indian by the name of Lewis Neptune?

Answer—Yes—

2^d Where did he live when you knew him?

Answer—His general resort was at Passamaquoddy.

3^d How many years since you first knew him?

Answer—Upwards of thirty years—

4th Did you ever hear him call the River Scoodiac by the name of the river Saint Croix?

Answer—Yes—

5th Did you ever hear him call it so more than once?

Answer.—Yes many times—

6th Is Lewis Neptune alive?

Answer—No—

7th Where did he die, and in what Year?

Answer—At a lake called Meddbemps on Denny's river with the small pox, when it was at Saint Andrews upwards of ten years ago—

8th Did you ever hear any other Indian or Indians call the river Scoodiac the Saint Croix?

Answer—I have heard an Indian by the name of Bungawarawick, Lewis Neptune's father frequently call it so, and many other Indians whose names I do not recollect—

9th Did you ever hear any Indian or Indians call the Magaquadavie the Saint Croix?

Answer—No—

10th Did you ever hear any white people who had lived in this country twenty years ago, call the river Scoodiac the Saint Croix (excepting John Curry Esq^r, Alexander Nichols Esq^r, Robert McCowan, James Brown and Jeremiah Frost)?

Answer Yes—Robert Wilson and John Lawless deceased and Edmund Lambert living on Deer Island—

11th Do you know of any facts or circumstances that will tend to 437 ¹
 establish the Magaquadavie to be the river Saint Croix—?

Answer No—

his
 ALEXANDER X HODGES
 mark

SAINT ANDREWS Octo^r 21st 1797

¹ Pp. 438 and 439 are blank.

SAINT ANDREWS
COUNTY OF CHARLOTTE *Octo^r 21st 1797.*

Personally appeared the abovenamed Alexander Hodges and made oath on the holy Evangelists of Almighty God to the truth of the foregoing deposition by him subscribed—

Robert Pagan and Joseph Garnett Esquires were notified and present at the taking of this deposition

Before me

JOHN CURRY J. P.

440 James Brown of West Isles in the County of Charlotte and province of New Brunswick Carpenter, aged sixty five years or Depositions of thereabouts, depose^th and saith that he has lived in James Brown and the Passamaquoddy settlement ever since the Year Jeremiah Frost One thousand seven hundred and sixty nine. That he together with Jeremiah Frost erected a hut near to where the public landing in S^t Andrews now is, which was the first building of any kind ever put up by any English subject, that he knows of, at or near that place.

441 Jeremiah Frost of Saint Stephen's in the County and province aforesaid, farmer, aged forty eight years or thereabouts depose^th and saith, that he has lived in the said Settlement ever since the year One thousand seven hundred and Seventy. That he together with the abovenamed James Brown erected the hut above-mentioned.

442¹ And the Deponents do each of them further say that having carefully perused and examined the foregoing deposition of Alexander Hodges, all and singular the several matters and things therein contained, from that point describing Passamaquoddy Bay to the close of the said Deposition, to their certain knowledge are in fact and substantially true, as they are therein set forth, such part thereof as relates to M^cCowan and Nichols, Colo. Lewis Neptune and M^r Boyd only excepted, to which not being knowing they further depose not—

JAMES BROWN
JEREMIAH FROST

WASHINGTON SS.

PASSAMAQUODDY *July 19th 1797.*

Then the within named James Brown and Jeremiah Frost personally appeared and after being carefully examined and cautioned to testify the whole truth and nothing but the truth made solemn oath to the truth of the within and foregoing deposition by them signed

Taken before me the Subscriber one of the Justices of the peace for the said County of Washington

JOHN BREWER

Copy.

¹ P. 443 is blank.

In some of the testimonies, taken on the part of the English 444
government, there are interrogatories proposed and answers given
which would be altogether irregular in a court of law,
but, as they are in this case, all that can be done is
to make such observations upon them as may have
a tendency to prevent any undue effect, if it could be conceived that
any such could be produced.

Comments on
depositions

The attempts to establish the Scoodiac as the river formerly known
by the name of the Saint Croix are very curious and amusing.
Perhaps from the appearance of that river at its mouth, which is
indeed but an arm of the Passamaquoddy Bay, a stranger who had
never progressed so far into the Country as to see the confluence of
what is in fact the *Scoodiac* with this bay or arm of the sea, had never
seen the head of the tide, or the partings of the Scoodiac and the
Cheputnaticook, might feel a rising wish that this stream had been
agreed upon as the boundary, and that wish might give aid to halting
evidence, and have an effect which the evidence alone could not
produce. But when, under the solemn obligation assumed by this
honorable board, the evidence is carefully viewed with an impartial
judicial eye, the appearance of those waters can produce no effect
whatever. When the eye is cast upon the map which is compiled
from the actual surveys; or when the rivers are seen or contemplated
in their several natural beds, the sheet of water between Saint
Andrews point, and the promontory called the Devil's Head, sinks
below the level of consideration, and the river contended for by the 445
United States appears to be much more suitable for a natural bound-
ary, than either of the others. But we will return to the evidence.

The testimony which is first offered for attention by the English
government is that of Alexander Hodges. This man was examined
ex parte by those whom from the weakness of his
mind (for he is said to be a miserably weak man) he
conceived himself under obligation to. He is, with
some degree of address, stated in his deposition to be "of the County
of Washington and Commonwealth of Massachusetts, Farmer."
This is done no doubt to furnish the idea of his having a prejudice
against rather than *for* the English side of the Question, and he is
styled farmer to give him a degree of respectability which he never
happened to possess. But as his character, his situation and con-
nections will be seen from other testimony: and his weakness of mind,
and want of veracity, will be discovered on the examination of his
evidence, it is not necessary to say more on the subject here.

Testimony of
Hodges

He says that he came to that part of the Country in 1763 on the

10th of August with one Joseph Parsons of old York in the employment of Gould and Shaw, and has lived ever since, in and about that neighbourhood.

That the waters without Moose Island were called Passamaquoddy bay, and within that and Deer Island Passamaquoddy or Pollock river. The Indians all give a very different account of the appellation of those waters. He goes on to give his opinion and judgment on the comparative sizes of the several rivers, says the Scoudiac is by far the largest, that he has hunted with the Indians on the West branch, when he was told by them that it was the main branch, and that the North branch is a small river or stream emptying itself into the other. Here this Witness at once appears as one who considers himself engaged on one side of the question, and determined to testify to such facts as would answer the purpose, for which he supposes himself to be called. He then tells us that the Scoodiac has never been called by the name of the Passamaquoddy river. The most a cautious and impartial witness could have said, would have been that he never heard it called by that name; though it has been marked on so many English maps and Charts by that name, yet he boldly swears that it was never called so. The Indians say that they never knew it called by that name, but this is accounted for by its having a particular name in their language, by which they knew it. But Hodges, being an Englishman, must have conversed with white people on the subject, and must have heard their appellation of it. He goes on to say, that the river Scoodiac is known and called also by the name of Saint Croix. When we come to examine the mode of his information, and to compare his testimony with that of others we shall see how far he may be depended upon. It has, he adds, *always been considered by him as the true and ancient Saint Croix*, but this is only because it is the most considerable river emptying itself into the bay. His judgment cannot be the standard, even if he was a fair and impartial witness, and there is an undue degree of irregularity, in thus procuring the judgment and opinion of a witness in a matter where his testimony ought to be confined to facts alone. The words *true* and *ancient* St Croix are by no means of his own coining. They are words very recently brought into vogue, and this witness could never have heard the sound of them until very lately.

Hodges gives us an account of his being at Pemaquid in his way from Boston, and having such an account from Alexander Nichols and Robert M^cCowan of that place as made him believe them to be the persons who first went down to that Bay on the business of the fishery of Alewives; that they told him, and that he had the *following*

account from their own mouths viz "That they had been down prior to that time upon a fishing voyage, and Indian trade in search of the river Saint Croix, expecting it was a large river of fishery, that they went east as far as Beaver Harbour &c that they went to the Magaquadavie expecting it to be the Saint Croix—found their mistake &c 447
A short time after they had been there, they found an Indian called Colonel Lewis Neptune; they prevailed on him to shew them where the river Saint Croix was, and that he carried them to the Scoodiac."

He does not say that they said the Indian told them positively that this was the Saint Croix. Hodges is one who can neither read [n]or write. His mark is at the foot of his deposition, and it is very improbable that he understands the force of language so far as to know the meaning of his own evidence. His deposition adds, that they said, that they ever afterwards considered the Scoodiac as the *true Saint Croix*. This mode of expression shews that no credit can be given to the man's testimony, because there was no dispute in existence at that time which could induce Nichols and M^cCowan to use the words true Saint Croix. It so happens that Colonel Nichols is yet living and has long been a respectable Magistrate in the Province and State of Massachusetts.

Upon seeing Hodges' deposition, the Agent for the United States, conceived it to be his duty to obtain those of Nichols and M^cCowan, if they were obtainable. Alexander Nichols Esq^r lives in Bristol in the District of Maine, more than two hundred Miles from Boston. M^cCowan has been dead for the space of several Years. The evidence given by Hodges is the greater part of it what in legal procedures is generally called hearsay evidence, and if the Persons from whom he had the facts are alive, it ought not to be admitted. But his errors and mistakes in that part will serve to shew how little regard ought to be paid to those facts and circumstances, which depend more upon his own knowledge and judgment.

The Agent for the United States, when he began to consider the evidence contained in affidavits taken on the part of the English Government, took the liberty to mention, that interrogatories had been proposed to the witnesses, and answers received from them, which would have been altogether irregular and inadmissible in a Court of Law. He had in his mind more especially those in the Deposition of Thomas Wright Esq^r which remains yet to be considered. 448

Testimony of
Wright

The four first Interrogatories put to that witness did [not] happen to draw forth Testimony to facts of any considerable importance

wherefore in the fifth, and last interrogatory, he is urged in these very extraordinary words, and this pressing manner:

Declare all you know or *believe* respecting the said river Scoodiac, as being the *true and ancient river Saint Croix*, and forming a part of the boundary mentioned in the title to these interrogatories, with the cause and reasons of such your knowledge and *belief*.

Here a witness who could not testify to any one fact of importance in the controversy, and who, as it will appear from a consideration of his evidence, had modestly disclaimed all knowledge in any manner pertinent to the issue, is called upon to decide the cause for the Board of Commissioners, by witnessing his *belief* respecting the Scoodiac, as being the *true and ancient river Saint Croix*, and the real boundary described in the Treaty of Peace. Thus situated and feeling himself relieved from the obligation of an Oath as to facts, by being let into a train of reasoning on a cause which he could by no means understand, he goes on to say:

I always understood, as well before as at the time of making the above-mentioned survey, and since, that the Scoodiac, or Great River Saint Croix, was a part of the ancient boundary between the British Provinces, formerly known by the names of Nova Scotia and Massachusetts-bay.

It is worth while to stop a moment, to examine this piece of evidence, if it can be called such. The Witness has "always understood as well before, as at the time of" the survey, in 1772. How did he understand, or from whence did he obtain his intelligence?

Is he the Judge to whom the Nation of America has confided its dominion over, and its property in an extensive Territory? is he, or the Board of Commissioners to determine, whether facts seen or related are good and proper evidence to found such an important, and decisive understanding upon?

But he has understood that the Scoodiac, or the Great S^t Croix, is the true and ancient boundary between the two Provinces mentioned by him.

The word *always*, as used there, imports at least a knowledge or understanding of the fact, before the survey of 1772. M^r Wright was a Native of Great Britain.

He does not suggest that he had ever been at Passamaquody before the Year 1772. Where did he then obtain a knowledge that the Scoodiac was called the Great Saint Croix? The first Map which ever gave it that name was published in the American Atlas in 1777, five years after his survey. There is no Map produced that gives it,

either the name of the Scoodiac or the Saint Croix, before that time. The Indians called it the Scutuck, but the French in their maps, as has been shewn, call it the Passemacodie, and the English the Passamaquody—probably on account of the Tribe who possessed the adjacent Country.

Lord Campbell was at the Island of Campo Bello in the year 1770, and according to M^r Curry's Testimony, did not know what river was the boundary of these Provinces, and therefore engaged Curry and another person to investigate the fact, and to enquire of the Natives, and white Inhabitants which river was the Saint Croix, and the boundary.

In the year 1787 M^r Morris the elder, the Surveyor General of Nova Scotia, was directed to find the river which had been the boundary, and under a Commission from M^r Parr, the then Governor of Nova Scotia, made search for the river, and found it to be the Cobscook. His return in favour of that river, as the true and ancient Saint Croix, was received and recorded by the Government as a true and faithful return. A Copy of the Record is in the Proceedings. What he calls 450
a Map of the Settlements on the Islands, in the middle of the Saint Croix, remains yet amongst the mysteries of his Testimony. It may be explained hereafter.

The Islands now found in that river correspond so nearly with what he has read in the productions of the Authors he has mentioned, and with the plans he has seen, that he has not the least room for doubt that the said Isle de Saint Croix, or Bone Island, was the identical spot on which the said Frenchmen made their first Settlement, about or between the Years 1604 and 1614.

There are no plans, documents, or histories which has [have] come within the notice of this witness, but what must be within the notice of the Board. And if there are any such, it is very clear, that his opinion, judgment, or belief is no evidence, and that this cause is to be decided upon the evidence offered by the Nations respectively, and not by his opinion or belief.

The Agent for his Britannic Majesty has continued himself for a great length of time on an [one ?] idea in his Argument, as if he realized that there was no evidence that the Scoodiac was anciently called the Saint Croix, unless he could make it appear that the place where De Monts wintered in 1604 was on that River; and on the other hand, has seemed to believe that, if he could establish that as a fact, it would be adequate to his wishes.

The Agent for the United States has already, as he believes, fully demonstrated the unreasonableness and fallacy of that Argument.

But, in the consideration of Mr Wright's evidence, it is clearly seen that he realized the necessity under which the Agent of his Nation laboured, and endeavoured by his Testimony to do that which had not been done by other evidence, or by Argument.

It would be tedious to dwell longer on this extraordinary piece of evidence, contained in the answer to the sweeping and strange Interrogatory. The Agent for the States will therefore proceed to consider the other parts of his Testimony which in substance amounts to this, and no more:

451 That the plan before him is a true Copy of one he made in 1772.

That he was employed by the English Government under Colonel Holland and had instructions for the Business.

That the Scoodiac was then called the Great River Saint Croix, and marked so on the Map.

That he had his information from a Mr Moro or Moreau, who furnished him with more than One Thousand Indian words. Thus far he goes in answer to the three first interrogatories, but the fourth seems to grow out of disappointments, resulting from the answers to the three first.

In that it is demanded, "Whether or not, were you informed at that time by any, and what Person or Persons that the river Scoodiac had for any time, and how long before been known by the name of Saint Croix river, or that the said river Scoodiac was the *true and ancient river Saint Croix, eminently so called.*"

The mode of this interrogatory to induce the utterance of facts that had not been hinted at, opened, or referred to in the answers to the preceding questions, needs no comment.

But the witness considering himself, in this instance, as a witness testifying to facts within his knowledge, and not as to his opinions, answers—that, at the time of making his survey, he had not been informed that the Scoodiac had for any time been called the Saint Croix, or that the said river was the true and ancient boundary and river Saint Croix; neither does he remember that any thing was passed thereupon—and adds that it is very improbable that such a conversation should have happened, as there was no dispute on the point at that time that he knew of.

Yet this Witness in the answer to the fifth and sweeping interrogatory declares that he understood, as well before as at the time of and since that survey, that the Scoodiac was the *true and ancient*
 452 *Saint Croix*. Where could he have acquired this understanding? if materials for it had been in L'Escarbot, Champlain &c he had never seen them—no English writer had ever pointed out that river as the

true and ancient Saint Croix. There was no map at that time on which it had been delineated or exhibited as such. Governor Bernard had attempted to explore the boundary in 1764, but he was bought off from the design in 1765. Governor Hutchinson sent a committee of the Council down in 1770, who claimed to the Magaquadavie, and Governor Campbell in the same year came to Campo Bello on the same enquiry. Moreau, who lived on that Island, and held an Office of Collector under the English Government or government of Nova Scotia, there two years afterwards, informed Wright the deponent that the Scoodiac was the Saint Croix. Governor Campbell had dispatched Curry and another on the discovery, and on their report and these facts, the witness swears that he believes that the Scoodiac has been long known as the true and ancient S^t Croix.

The river was not then marked as the S^t Croix but only called the great S^t Croix. This comparative mode of expression fairly indicates, and irresistibly implies, that there was a little S^t Croix at that time. Indeed, in the American Atlas published in 1777, the rivers are so denominated. But when Des Barres compiled his map from the survey of this very witness and others, he lays the Magaquadavie down without a name, lays aside the comparative mode of expression and calls the Scoodiac what it had never been called before—The *Saint Croix*.

The English government attempts to prove, and boldly asserts that the Magaquadavie was never for a moment honored with the name of the Saint Croix, and yet as the opposition ferments, the truth works up so much, that they are obliged to prove that it had the name of the *little S^t Croix*. And yet it was never called so before this notable survey, or afterwards, excepting in the Atlas published in 1777. The testimony of M^r Morris Junior [merely is] that in the year 1783 the 453 Indian called Colo: Lewis told him that the Scoodiac was the *true* S^t Croix; that he has been several miles up the Magaquadavie and never heard the Indians call it the Saint Croix. M^r Boyd in his deposition gives us the names of various Indians who wore the name of Lewis and of Neptune. Perhaps M^r Morris might find one of these, and he does not say that he ever saw an Indian on the Magaquadavie. His evidence on that point is merely negative testimony and amounts to nothing at all. M^r Morris's testimony is intended by the one fact he swears, and from his and that of others, to detract from the united testimony of the natives solemnly taken at several times, one instance of which was under peculiar solemnity, before this honorable board. But there is so little effect or force in the fact Morris swears to, even aided by Curry's, Wright's and Hodges', to controvert the

conclusive proof arising from the testimonies of the Indians and white people, explained and supported by the ancient and modern maps, that there can be no need of further attention to it.

454 How M^r Wright came by this understanding from which Governor Campbell, Governor Parr, and the Surveyor General were so totally excluded is a very mysterious circumstance. M^r Wright in his argument (for it is clearly nothing else) goes on to observe, that

since being summoned to attend the Commissioners, he has bestowed some attention towards improving himself on the subject of their investigation—Has perused several publications of voyages made by the French to Acadie—their discoveries, conquests, settlements, made by *De Monts*, *Poutrincourt*, *Champlain*, *L'Escarbot* and others on a small Island which they named S^t Croix, called on my said plan Bone Island, situated in the midst of the river Scoodiac, or great Saint Croix. He has also critically examined the French Settlers' plan of said Island, handed to him by Ward Chipman Esquire, and has compared it in every particular respecting the situation as described by the said French settlers, its admeasurement, slope &c, with that of his own survey in 1772, and finds such the said description and plan of the said Isle de Sainte Croix, so very nearly to correspond therewith as to leave not the least room for doubt, that the said Isle de Saint Croix, or Bone Island, was the identical spot, on which the said Frenchmen made their settlement, some time about, or between the year 1604 and 1614—There is no other situation to be found in the circuit of the whole bay of Passamaquoddy, to which such the said French description of, and plan, would in the least apply to. So that taking the whole into consideration, I have every reason most assuredly to believe that the said river Scoodiac is the true and ancient river named Saint Croix.

This most extraordinary and unexampled paragraph of testimony, or rather argument, deserves, and must have a critical examination. The interrogatory which is formed to give it birth, can have no countenance or support from precedents, or judicial forms of procedure. But the answer is more extraordinary still. It is in its form and substance an assumption of the duty of this tribunal, and an attempt by groundless conclusions, forced deductions and extraneous
455 unnatural inferences, to decide a cause on a few impertinent, unintelligible facts, which can never be fairly determined without travelling through a vast field of enquiry, and investigating an infinite number of facts and circumstances, which are far beyond the ability or comprehension of this deponent.

He says that he has lately examined the histories of the settlements made by the French on the small Islands in the Scoodiac river by De Monts, &c between the years 1604 and 1614, and a plan of the

same—and then gives his opinion and belief. This unexampled intrusion of opinion and belief can never be justified upon any principles heretofore drawn into practice, nor excused upon any other apology, than that of the Deponent's having been habituated altogether to another mode of life, feeling a degree of dependence upon the power by which he was summoned, and being under a very irregular and unjustifiable requisition in the interrogatory put to him. If there are any histories written by the authors which he has named, or settlements being made any where, the witness might very well leave the understanding of these to the constituted authority for decision, without offering his opinion or understanding upon the subject. All the evidence of that kind which can be obtained, will be produced in the trial; and though Mr Wright is very respectable in his professional business as a Geometrician, yet his opinions and judgment would never be relied upon in a question of this intricacy and magnitude—

I John Frost of Passamaquoddy aged sixty nine years, do testify and declare, that I came to Passamaquoddy in seventeen hundred and sixty three, and settled on a place called Pleasant point, where I have resided (most of the time) ever since—That my sole object in coming into this part of the country was to trade with the Indians—That for the first ten years of my residence here, I was constantly engaged in the trade with them—That in consequence of this trade I became perfectly well acquainted with the Passamaquoddy tribe of Indians; particularly with Lewis Neptune, Bungawarawit, John Batiste Neptune and John O'Denny, principal or chief men of said tribe,—That I have had frequent conversations with the said Lewis Neptune, Bungawarawit, John Batiste Neptune, and John O'Denny, respecting the river Saint Croix, and that each of them often and uniformly declare[d] to me, that the river *Magaquadavie*, was the Saint Croix. That I brought into this part of the Country, a Mr Mitchell, a Surveyor, sent by Governor Bernard to explore the river Saint Croix, which circumstance led me to make more particular inquiries of the Indians, respecting the said river. And this deponent further testifies, that all the Indians with whom he had conversed, always told him that the Magaquadavie river was the Saint Croix. And this deponent further testifies, that the white people living in this part of the country, (with whom he had been acquainted) always considered the Magaquadavie the Saint Croix river, and that he never heard any person call the Scodiack the St Croix river, till a number of people came and settled at Saint Andrews in the year seventeen hundred and eighty three or four—

Testimony of
John Frost

Questions by Robert Pagan and Joseph Garnett Esquires

1. On what particular occasions did you hear Louis Neptune, Bungawarawit, John Batiste Neptune, and John O'Denny call Magaquadavie the Saint Croix?

457 *Answer*—When I brought M^r Mitchell down here to explore Saint Croix River—

2nd What river did M^r Mitchell explore when he came on that business—

Answer—M^r Mitchell told me he had been at the *Magaquadavie*, and found it to be the Saint Croix. He did not tell me he had been to any other river—

3^d Did you command the vessel in which M^r Mitchell came to this part of the Country to look for the river S^t Croix?

Answer—Yes—

4th Where did you land him?

Answer—At Indian Island.

5th Did you go by any particular draft when you traded at that time in Passamaquoddy bay?

Answer—Yes—By Cap^t Southack's draft—

6th Did you show this Draft to M^r Mitchell?

Answer. Yes. We looked at it frequently on the passage.

7th Had M^r Mitchell any other draft that he shewed you, or compared in your presence with Cap^t Southack's draft which you shewed him?

Answer—I do not recollect that he had—

8th Did great plenty of fish resort annually to Scoodiac Falls when you first came here and since—?

Answer Yes—I went to the *Magaquadavie* falls in the month of May, about the year 1765 or 6, in a sloop of 75 tons with Cap^t Tucker to carry on the Salmon, Shad and Alewife fishery, and finding no fish at the falls (as we only caught about a barrel, after being there for 7 or 8 Days) went to Scoodiac River, where we joined with M^r M^cCowan and Cap^t Nichols, who were there in two vessels, one of about 30, and the other about 45 Tons, where we caught in company from 800 to 1000 barrels, chiefly Alewives, with some Salmon Shad and Bass—The Alewife fishery continues there to this day, where those who are after fish go to take them—

9th Do you know of any Grampuses or Whales going up Scoodiac River—?

458 ¹ *Answer*—I do not remember of ever seeing any, more than half way between Pleasant point and the Devil's Head.

10th What part of Passamaquoddy bay do Grampuses and Whales resort to?

Answer Between Pleasant point and Head Harbour,—but not in great numbers—

11th Are Salmon, Shad and Alewives, caught in any other river in your neighbourhood?

Answer Up Cobscook, on Denny's river, where M^r Lincoln lives they are caught, but not in plenty as at Scoodiac river—

12th Where is Passamaquoddy Harbour?

Answer—I have always understood Head-harbour to be Passamaquoddy harbour—

13th Where is Passamaquoddy river?

¹ P. 459 is blank.

Answer—From Head-harbour, till you get to Scoodiac I call Passamaquoddy main River.

14th Is there any other entrance into Passamaquoddy river, but by Head-harbour?

Answer—There is a way to come in by West-Quoddy, but it is barred, so that at low water, you cannot come in with a whale boat—You can also come in by Petit passage into S^t Andrews bay, or Passamaquoddy bay, which communicate with Scoodiac river—

Question by Phineas Bruce Esquire

Did you ever know any determinate line of jurisdiction between the provinces of Massachusetts Bay and Nova Scotia?

Answer Mr Mitchell when he was coming down with me, and while he was here, told me Magaquadavie would be the dividing line—

JOHN FROST

Interrogatories put to Alexander Nichols Esquire by James Sullivan Esq^r Agent for the United States, and answers given to the same viz. Testimony of Alexander Nichols

Int. 1. Were you ever at Passamaquoddy, and when were you there the first time? 460

2nd With whom did you go, what was your business and how long did you tarry there?

3^d Were there any white people there then, and if they [there] were, who were they?

4th Did you see a man there by the name of Alexander Hodges?

5th Did you see any Indians there?

6th Did you hear anything said by the Indians respecting the names of the rivers which run into that bay, and what did they call them?

7th Did you hear the Indians say which river was called Saint Croix?

8th Did you find any crosses erected, and where?

1. *Answer*—I have been several times at Passamaquoddy, the first time I think was about the year 1760—

2nd Robert McCowan and Thomas Fletcher were connected with me in the Indian trade and we at first were together in our own vessel when we went there. Our business then also was after the fishery of Alewives and I believe, as we understood, that we were the first Englishmen that had gone up the river. I, for four or five years made a trip each season, and tarried there two months or longer each trip, and had views of settling there under proposals made me from Governor Bernard

3^d In the seasons of my being there I have seen several white people in Passamaquoddy-bay that came from the westward after the Cod fishery, but there were no settlements that I remember unless it was Prebble on the western side of Scoodiac—Wilson on

Campo Bello, and Chaffey on Indian Island where the Fishermen cured their Fish

461 ¹ 4th I do not recollect to have seen or ever heard of any man there by the name of Alexander Hodges—but one James Boyd came there about our second or third season, pretending right from the Governor at Halifax, and as I had before that time taken possession up Scoodiac river, built me a Camp and made roads for our accommodation we disregarded his claim; and I should have settled there if my family had consented.

5th I have seen many Indians there—I remember one John Batiste Neptune in whom we confided much—

6th We conversed with the Indians freely by our Robert McCowan who spoke with them in French, and Thomas Fletcher who understood the Indian language—That River, at the falls of which, we fished they called *Scoodiac*, a river to the westward they called Cobscook, and one to the eastward they called *Saint Croix*, all running into the same bay.

7th Before that we went to Passamaquoddy we had heard only the river Saint Croix and when we got to Quoddy, some controversy arose amongst ourselves as to which river it was; we therefore applied to the Indians who informed us that the river Saint Croix was the smaller river that lay to the eastward of Scoodiac some miles, but Scoodiac they said was the river for Alewives, and we did not go to Saint Croix.

8th On the eastern side of Scoodiac river, I think near by the mouth of it, at a place named S^t Andrews, there was a piece of ground by the Indians allotted for burying their dead, and here I remember to have seen some crosses erected, some higher than others of wood roughly finished, which to us indicated the more sacred use of that spot.

ALEXANDER NICHOLS

LINCOLN SS BRISTOL 25th Sep^r 1797.

Before me James Nichols Esq^r one of the Justices of the peace for the county aforesaid, personally appeared the aforementioned Alexander Nichols Esq^r and made solemn oath to the truth of the foregoing answers by him subscribed and given to the preceding interrogatories.

JAMES NICHOLS *Justice Peace*

464

Testimony of
James Nichols

Interrogatories put to James Nichols Esq^r by James Sullivan Esq^r Agent for the United States, and answers given to the same—viz.

Interrogatory

1. Were you ever at Passamaquoddy, and when were you there the first time?

2nd With whom did you go,—what was your business, and how long did you tarry there?

¹ Pp. 462 and 463 are blank.

3^d Were there any white people there then, and if there were, who were they?

4th Did you see a man there by the name of Alexander Hodges?

5th Did you see any Indians there?

6th Did you hear any thing said by the Indians respecting the names of the rivers, which run into that bay, and what did they call them?

7th Did you hear the Indians say which river was called S^t Croix?

8th Did you find any crosses erected, and where?

1. *Answer*—I was twice at Passamaquoddy I think about the years 1764 and 1765.

2nd I went there with my father Alexander Nichols Esq^r Robert M^cCowan, and John Nichols to their aid in the alewife fishery and tarried each season two months or longer.

3^d There might be thirty or forty white people there in the Cod fishery from the westward, who cured their fish on Indian Island, but there were no settlements that I remember, other than Prebble on the west of Scoodiac river, at a place called Pleasant point—Chaffey on Indian Island and Wilson on Campo Bello.

4th I never saw Alexander Hodges there, but a man by that name came passenger with me in Robert M^cCowan's vessel from Boston to Pemaquid, about the year 1767—who said he was a hunter at Passamaquoddy and was going there as he said to settle—

5th I have seen many Indians there whom I understood belonged to that place.

6th I have often conversed with those Indians, and understood 465 them perfectly, that the river we fished in was called *Scoodiac*. A river to the eastward of this about eight miles, they called *Saint Croix*, and a river to the westward of us they called *Cobscook*. I used to ask them as they passed us *Where walk*—they would answer me sometimes *Saint Croix*, sometimes *Cobscook* and sometimes *Saint Andrew*.

7th I always understood them that Saint Croix river entered into the eastward of Saint Andrew—

8th On the eastern side of the Scoodiac river at Saint Andrews point as the Indians called it, I have seen several crosses to the number of twenty or more, erected from two to eight feet high which are supposed was by reason of that place being their burying ground.

JAMES NICHOLS.

LINCOLN SS BRISTOL 25th September 1797—

Before me Alexander Nichols Esquire one of the Justices of the peace for the County aforesaid, personally appeared the aforementioned James Nichols Esquire and made solemn oath to the truth of the foregoing answers by him subscribed and given to the preceding interrogatories.

ALEXANDER NICHOLS *Jus Pace*

That this Alexander Hodges is a very weak, or a very wicked man, 466 may be fairly inferred from a number of circumstances before the

Board. He swears minutely, and positively, that "he came down to Passamaquoddy, with Joseph Parsons of Old York, then in the employ of Robert Gould and Francis Shaw of Boston in the Indian Trade and landed at Pleasant Point the tenth day of August, 1763."

The Agent for the United States has found the Books of M^r Shaw, and those of M^r Gould. Those of the latter are in the hands of Herman Brimmer Esq^r one of the most respectable Merchants, and one of the best Characters in Boston. His deposition is before the Commissioners; in which he deposes that the copy of an Account, which it contains is exact, and is the whole of the Account stated in the said Gould's Books between him and a man by the name of Joseph Parsons of Old York.

Benjamin Shaw, a Son of Francis Shaw, who is mentioned in Alexander Hodges' Deposition, Testifies that in the Books of his late Father an Account is Stated with Joseph Parsons of Old York beginning in April 1765 and closed in October that year. This shews clearly, that if any credit is to be given to Alexander Hodges, yet that he is mistaken as to the time when he went down to Passamaquoddy. There is a great doubt whether Hodges ever saw that Country before the year 1767. The account which he gives he probably then received from M^cCowan and Nichols and [on] his Voyage from Boston to Pemaquid.

467 From these two Depositions, two facts of great importance as applied to Hodges' Deposition are established. The one is, that Joseph Parsons of Old York was never engaged, at Passamaquoddy, in either the service of Gould or Shaw, until the year 1765. Whereas Hodges swears positively, and minutely, that he landed there, under Joseph Parsons of Old York, on the tenth day of August 1763.

Another fact is clearly established, that Hodges was never there in that employ. In the credit given to Parsons on these Books his own personal Services only are credited, and Hodges has no Account in the Books of either. Now if he was employed by Gould and Shaw, or by either of them, he must have had an Account on their Books; if he was employed by Parsons [as] their Agent, he must have had credit on their Books for Hodges' Services, which he never had. From this it will clearly follow, that Hodges cannot be depended upon, either as to the date of his being first at Passamaquoddy, or as to any of the facts he has related.

468 I William Ricker of Moose Island in the Bay of Passamaquoddy, aged sixty-four years, do testify and declare, that I have resided in said Passamaquoddy upwards of twenty-six years
 Testimony of William Ricker —That I have been well acquainted with the Passamaquoddy Tribe of Indians, particularly with

Louis Neptune, John Batiste Neptune, and John O'Denny—That I have had frequent conversations with the said Louis Neptune, John Batiste Neptune, John O'Denny and many other Indians respecting the river Saint Croix,—That they always called the Magaguadavic, the Saint Croix river—That all the white people in this part of the Country, with whom I was acquainted, always called the Magaguadavic, the Saint Croix river—and this Deponent further testifies that he never heard the river Scoodiac called the Saint Croix river till the year 1783 or 4.

Questions, by Robert Pagan and Joseph Garnett Esq^{rs}

1st How many years ago did you hear Louis Neptune, John Batiste Neptune and John O'Denny—call the river Magaguadavie the Saint Croix?

Answer. Twenty-six years ago.^a

2^d On what occasion did you hear them call it so?

Answer. Upon no particular occasion;—but generally upon their going or coming from the Magaguadavie.

3^d Did you hear all the white people in this part of the Country, with whom you was acquainted, always call the Magaguadavie the Saint Croix river, above twenty years ago?

Answer. Yes.

4th What are the names of some, of all your white acquaintances who called it so?

Answer. Joseph Cowrick, William Cheney, James Chaffey, John Lumber, Robert Wilson, William Clark and John Curry Esquire.

5th On what occasions did you hear them call it so?

Answer. I do not recollect.

6th Who did you hear call the river Scoodiack the Saint Croix, 469 since the year 1783 or 1784?

Answer. A M^{rs} Jones, Wife of M^r Jones a Surveyor who laid out the land at Saint Andrews.

7th When did you first come to this part of the Country and where did you begin your first Settlement?

Answer. I came into this part of the Country twenty-six years ago last April, and begun my first Settlement the next June at Scoodiac falls, where Jacob Libbey now lives.

8th Were Fish plenty there at that time?

Answer. Yes, very plenty.

9th Of what kinds?

Answer. Salmon, Shad, Alewives, and Bass.

10th Did Grampuses, or Whales resort there?

Answer. No, I saw no such thing there.

11th Were Fish plenty at Magaguadavie river at that time?

Answer. I cannot tell, for I don't know that anybody went there at that time after any, as they all went up Scoodiac after them.

12th Where is Passamaquoddy harbour?

^a1771.

Answer. I don't know any place particularly called so.

13th Where is Passamaquoddy river?

Answer. I have heard of such a river lately, but cannot describe it.

14th Do the Inhabitants of Passamaquoddy, and its Neighbourhood continue annually to resort to Scoodiac, to take Salmon, Shad, and alewives?

Answer. Yes.

15th Is there any other river in or about the Passamaquoddy settlement to which they also annually resort for the same purpose?

Answer. I do not know of any other.

16th Were Grampuses and Whales plenty in any part of Passamaquoddy, when you first came there?

Answer. Yes, between Pleasant Point and Head-harbour.

17th Do you know of any being killed there?

Answer. Yes I saw Capt. Folger from Nantucket who came down on the whaling business (and made up his Voyage at Head harbour) kill one between Moose Island and Dudley Island which made 70 Barrels of Oil.

470 18th What Government did you consider yourself under when you first settled in this part of the Country?

Answer. I came from Bobtick in Nova Scotia and began my settlement at Scoodiac falls under James Boyd Esq^r; then a Justice of the Peace of the Province of Nova Scotia, who held lands there (as I understood) under a grant of said Nova Scotia; and from thence I removed to Campo Bello, where the Currency was four shillings and six pence to the Dollar, which Currency was then usual in the Bay of Passamaquoddy.

1st Question. *By Phineas Bruce Esquire.*

What Stores were then in Passamaquoddy?

Answer. M^r Owen kept a large Store on Campo-Bello, and James Boyd, and James Chaffey carried on a small trade at Indian Island, which were the only Stores I knew in Passamaquoddy, at that time.

2^d Question. *By Phineas Bruce Esquire.*

Did you ever know any determinate line of Jurisdiction, between the Provinces of Massachusetts-bay, and Nova Scotia?

Answer. I did not.

WILLIAM RICKER

WASHINGTON SS. PLEASANT POINT Novem^r 8th 1797.

Personally appeared the above named William Ricker, and after having been carefully examined, and duly cautioned to testify the Truth, the whole Truth, and nothing but the Truth, made solemn oath to the Truth of the foregoing Deposition by him subscribed—Robert Pagan and Joseph Garnett Esquires were notified and present at the taking of this Deposition.

Before me—

JOHN BREWER *Justice of the Peace*

The Deposition of the Native Indians, of William Ricker and of James Boyd, must be amply sufficient to shew that no degree of confidence can be placed in the Testimony of Alexander Hodges, and that John Curry must be entirely mistaken; that principles of National prejudice, and the feelings of his own private Interest, have had their influence upon him, which disqualify an honest man to be a witness in his own cause; and which from the natural constitution of mankind cannot fail to create a bias. M^r Curry, placed on the general foot of humanity, cannot but regard his Thousands of Acres so much that every one who conversed with him on the subject would be under a necessity to be cautious, not to say anything disagreeable to him on the subject of the said Saint Croix boundary.^a 471

There is a fact established by the report of General Brattle, M^r Bowdoin, and M^r Hubbard, of great importance on this point.

They report that all the Indians informed them that the Magaquadvie was the Saint Croix, and that they there found a man who had traded with the Indians for the space of Sixty Years who gave them the same information; and said that all the Indians from the Oldest to the Youngest had uniformly agreed that no other river in that Bay had been called by that name.

The Evidence of Alexander Nichols, and James Nichols, with the extracts from the Books of Gould and Shaw, must be conclusive against Hodges.

Testimony of
Alexander and
James Nichols

472

The Agent for the United States has not seen Colonel Nichols since Hodges gave his Testimony.

He sent him the plain uninfluential Interrogatories which are now before the honorable Board, a copy of which is placed in this Argument. To which he received the answers, a copy whereof are subjoined, by which it appears that he and M^r M^cCowan had for two years before the year 1763, and that year also, and for some years successively before Hodges was with them at Pemaquid, been down to the Scoodiac on the business of the Alewife fishery; and that they continued the business after the year 1763. But, according to Hodges evidence, they told him that they were discouraged by Boyd's claiming an exclusive right there, and that they relinquished the fishery and gave him, Hodges, their empty Casks. Whereas Nichols says that Boyd made a claim, which was by them totally disregarded, and that he should have settled there under Governor Bernard if his Family had consented to it. He says that he does not recollect ever hearing of Alexander Hodges there.

^a James Boyd lived at Saint Andrews. Curry was at one time a Copartner in Trade with him. The Deposition of Boyd is on file in regard to John Curry's Interest as having Two Thousand Acres involved in this Controversy.

James Nichols Esq^r, whose testimony has been taken in the same manner, a Copy of which is subjoined, says that he was with Alexander Nichols Esq^r, his Father, at Scoodiac, that he never saw Alexander Hodges there, but that a man by that name went Passenger with him in the year 1767 from Boston to Pemaquid, and told him that he had been a Hunter at Passamaquoddy and was then going there to settle.

As Hodges tells his story M^cCowan and Nichols, both told him that Lewis Neptune informed them that the Scoodiac was the river Saint Croix, and that they believed that to be the *true* river Saint Croix, from what he had said, and what they saw. But when we read the testimony of the same Nichols, from whom he pretends to have received his intelligence, we find him saying that he and his Partners were the first people who went to the Bay of Passamaquoddy on the
473 business of the fishery, that there were few settlements there when they arrived, that he remembers amongst the Indians he saw there John Batiste Neptune, in whom they confided. This was no doubt the Indian, who is mentioned at second hand by Hodges. That they conversed with the Indians freely through M^cCowan who spoke French,^a and Captain Fletcher who spoke the Indian language, and that the river where they fished the Indians called Scoodiac, the one south from that the Cobscook, the one East the Saint Croix, all running into the same bay; that their mistake in regard to the river, as hinted at by Hodges, actually took place, which led them to consult the Indians, who all agreed that the river on the East-side of the bay of Passamaquoddy was the Saint Croix, but the Scoodiac was the best for the alewife fishery. James Nichols Esq^r testifies to the same facts, and adds, that he conversed frequently with the Indians, who all told him that the river where they fished was the Scoodiac, and that the Saint Croix was about Eight miles East from it, on the other side of the bay. Hodges and these Gentlemen agree in these facts, that they were the first who went there, and that the Country was a Wilderness when they found it.

What Hodges testifies respecting the river Saint Croix, he had chiefly from the communications of Alexander Nichols and Captain M^cCowan; but Nichols, under Oath, contradicts the most substantial part of his testimony, and clearly establishes the fact that the river which was, on the first English Peoples going there, after the reduction of Canada, called the Saint Croix, is the Magaquadavie.

James Nichols Esq^r, who is the son of Alexander Nichols Esq^r,

^a M^cCowan's Father was killed at Sheepscott in 1724, and he was carried to Canada and sold to a Frenchman and brought up in a French family.

testifies substantially to all the facts in his Father's Testimony. These Gentlemen are to be depended upon. Their Family has always been respectable.

They have ever been within the public notice, and have supported a good reputation. They have no interest in this business, nor have they any dependence upon any man or body of men, which could warp them from the Truth. These witnesses who are neither false [n]or illiterate shew that Hodges is mistaken. Their testimonies may be therefore safely left in the scale against his, with a firm reliance that his detected weakness, or want of veracity, has left his testimony without any weight against them. 474

The frailty of this witness being so fully detected in the main facts of his evidence, the honorable Board can pay no regard to his belief, his opinions, judgments, and conclusions, which swell his deposition, in order to give it a necessary degree of importance.

If he was the most credible witness in the Country, yet he testifies to no substantial facts, as of his own knowledge, but to what he has heard others say. And the very men, whom he has named as his informants, are regular witnesses in the cause and deny the facts. The least therefore which can be said, is, that he is mistaken.

The depositions of James Brown and Jeremiah Frost, are very well as to the fact, that in 1769 they came to Passamaquody and erected a Hut at Saint Andrews. But that part of their deposition which is in confirmation of Hodges is very erroneous. Testimony of
Brown and Frost

They declare that all and singular the matters in his deposition contained are true, from that part describing Passamaquody-bay to the close, excepting what relates to Nichols and M^cCowan, Col^l Lewis Neptune, and Boyd. This is a summary way of giving testimony, and he must be a wise man indeed who can divide what relates to the description of Passamaquody-bay, and the story told as from Nichols and M^cCowan, from the rest of his story. But the intention obviously is, to make them appear to testify that the Scoodiac was called the Saint Croix at that time. The Sachem called Lewis Neptune is quoted by them, and by Hodges, as the man whose information could be relied on. We shall find in the course of the evidence to be considered hereafter, as well as from the testimony of the two Nichols' already offered, that the whole current of that Sachem's averments was the other way, and that Hodges and any others, who have either directly or incidentally testified otherwise, are entirely mistaken, or grossly corrupt in their testimonies. 475

The testimony of John Curry Esq^r may next deserve attention.

M^r Curry is one of the Magistrates under the Province of New-Brunswick, and though it will evidently appear, that his Interest as a Loyalist cannot but create a strong prejudice in his mind, and that he is very much mistaken in some part of his testimony, yet the Agent for the United States has no wish to say any thing which might tend to implicate him as to his veracity. But yet when we come to examine his testimony, it will appear but as a weak and impotent interruption of the continued evidence, which invariably proves the Magaquadavie, to have been forever considered as the river S^t Croix.

M^r Curry according to his own Testimony came into the Country in the year 1770. The survey and claim by Governor Bernard had been made six years before that date. The enquiry by Governor Hutchinson under the Seal of Massachusetts was instituted in the same year. This brought Lord William Campbell to Campo Bello Island, on enquiry respecting the boundary, and the people about that part of the Country, as well as M^r Curry, might very well be ready to echo the sounds of an opposition from his Lordship to the claim of Massachusetts, then agitated by Governor Hutchinson.^a

476 But when we come to compare the testimony of this witness, with that of the others in the cause, there will be but a very inconsiderable force attached to it.

He says that he heard Louis Neptune, John Batiste Neptune, John O'Denny, Bungawarawick, and several others, call the Scoodiac the Saint Croix; the others besides those he has named, he does not know.

This John Curry Esq^r was a partner in Trade with the same James Boyd Esq^r who is spoken of by Alexander Hodges, and by Alexander and James Nichols Esq^{rs}.

Boyd went down to that Country, as he declares in his Deposition, which is on the Table, and a Copy annexed, in the year 1763, seven years before M^r Curry came there in the year 1770. M^r Boyd, who was afterwards a Magistrate in the Province of Novia Scotia, declares that in the year 1764 he saw Lewis Neptune, the son of Bungawarawit, stand on the bank of the Magaquadavie, and declare that to be the river which was known by the Indians by the name of Saint Croix; that a number of Indians, appointed by the Governor of the Passamaquody Tribe, were present for the purpose of pointing out to John Mitchel the river Saint Croix, and that they all declared the same river to be known by that name and no other.

^a M^r Curry was never very intimate in that Country. He came from Ireland and settled as a Trader on Saco river. The Agent for the United States knew him there for several years. He was not successful there, and therefore left that place, but had no permanent residence at Passamaquody until the civil war was commenced in America.

These Indians were then, as appears by the testimonies of James Boyd, John Mitchel, Nathan Jones, Israel Jones, Jacob Bradbury Esq^{rs} and M^r Abraham Duncan, all under the solemnity of an Oath.

That Capt. Fletcher was sworn as Interpreter, that they all declared that they understood the nature of an Oath. And the honorable Board will readily be convinced from their own observation that no people of any colour, nation, or religion, pay a greater regard to the obligations of such solemnities, than these Indians do. Under these impressions, they all declare the Magaquadavie to be the river known 477 by the name of the Saint Croix.

It would be very extraordinary then, if there were no other facts in the case, to render M^r Curry's testimony doubtful, that he never heard any of the Indians before the year 1783 call that river by that name. Why they should then begin to call it the Saint Croix, after the English had taken possession of the Country, and claimed the Scoodiac as the boundary, no one can find a reason for. The strongest imagination could not, by any means, discover a motive for their beginning then to irritate and disquiet their new Neighbours, who then came to enter into a permanent Trade with them, and whom they could have no hope or wish of removing.

John Fountain an Indian of the Passamaquody Tribe declares, (and his deposition is before the Board) that he is Sixty-seven Years of Age, that he has lived at Passamaquody Twenty-nine Years, that is from two years before M^r Curry went there, and that the whole Tribe have always called the Magaquadavie by the name of the *Saint Croix*; and he, with those of the Tribe sworn before the Board, testify that no other river in the Bay has ever, that they know of, or have heard of, been called by that name, and particularly that he has heard Bungawarrawit, Lewis Neptune, John Baptist Neptune, and John O'Denny, the Chiefs of that Tribe, and all the White People, with whom he has been acquainted, call that river by that name; and yet M^r Curry testifies that these very Indians, and the white people there have called the Scoodiac by that name, and that no other river had that appellation before the year 1783.

Was there nothing further in the cause opposed to the testimonies of Curry and Hodges, their testimonies could not obtain any considerable degree of credit on the fact. 478

John Frost's deposition on this point demands a particular attention. He says that he came to Passamaquody-bay upon the sole object of trading with the Indians in the Year 1763, that he was acquainted with the whole Tribe there, and has always heard them call the Magaquadavie the Saint Croix; and names Louis Neptune,

Bungawarrawit, John Baptiste Neptune, and John O'Denny, heads of the Tribe, the very men named by Curry—and says that they always called that river and no other by the name of the Saint Croix. He adds further, that all the white people, living in that part of the Country, always called that river by that name, and that he never heard the Scoodiac called so until a number of People settled at Saint Andrews in 1783.

Curry never heard the Magaquadavic called the Saint Croix until 1783, and the other witnesses never heard the Scoodiac called so until that year.

There is something in every question, depending upon Testimonies, which points the enquirer to the Truth. The natural circumstances attached to causes are generally an unerring guide in the investigation of facts. No man can find a motive, or assign a reason, to support the idea that the Indians should always in their testimonies solemnly taken at various times, and conversations before the year 1783, call the Scoodiac the Saint Croix, and then turn round, and unite in giving that name to a river which had never before been known by it, and under oath, and in every mode, combine in a falsehood, denying that the Scoodiac was ever called by that name, and in affirming that the Magaquadavic had always gone by that appellation.

If anything could raise these People to a determination to oppose the truth, it would be the settlement of the Loyalists at Saint Andrews, and their connection with, and their dependence upon them. Perhaps the splendor and dignity of a Monarchical Government has not a greater effect on any People in the world, than it has on these native Indians.

479¹ The form of the Government, the support and the pensions afforded to the first settlers there, would certainly have had an irresistible effect to have prevented an entire, and uniform combination, to deny that to be the river Saint Croix, which their new Neighbours, and the Government on which the Indians depended for traffic and support, asserted, from strong motives, of public and private interest, to be so. And yet to give credit to M^r Curry's testimony is to adopt all these incredible conjectures, and palpable absurdities.

The testimony of William Ricker is in the case. The same facts, from the same Sachems, are contained in his evidence as are found in the one last considered. He, as well as Frost, is a man of respectable character, and a natural and rational comment on his testimony would be only a repetition of what has been said upon that of John Frost.

¹ Pp. 480 to 484 are blank.

Under these facts it would be no less astonishing than ineffectual, in the British Government, to attempt to prove that the Scoodiac was called by the Native Indians, or by the first recent Settlers of Pas-samaquody, by the name of the Saint Croix, or to subvert or destroy the plenary evidence, now before the Board, of the Magaquadavie having been always called by that name.

Having gone through the consideration of the evidence offered by the two governments respectively, the Agent on the behalf of the United States conceives that the evidence on the part of the Government which he has the honor to serve

Summary of
results

does fully support the following important and decisive positions: That the Continent of America as high as the forty-eighth degree of North latitude was originally claimed by the British Crown from a right of prior discovery; that the Grants to the North Virginia Company in 1606 extended by the name of New England to the forty-fifth degree; that the Country from the forty-fifth to the forty-eighth was originally called *Nova Scotia* or New Scotland; that, from the Cession made in the year 1632 by the treaty of S^t Germain's' of all that country to the Crown of France, the Grant to Sir William Alexander from King James was considered as a nullity, and from that time ceased to have any force, efficacy or consideration; that the whole Country east of Penobscot was granted away by the King of France and held under those Grants until the conquest of 1654 by Oliver Cromwell; that the same was ceded again to France by the treaty of Breda in 1667, and held as before, until Sir William Phipps conquered it in 1690.

That all the territory as far north as the river and Gulph of Saint Lawrence was granted to the province of Massachusetts bay by the charter of William and Mary in 1691.

That the Country again, North of the river S^t Croix, was ceded to France by the treaty of Ryswick in 1697. That in the year 1703, that Province practically relinquished its claim to all the lands which were relinquished by that treaty. That the Saint Croix from that time has been considered as the boundary of that province. That the river intended as a boundary between the Dominions of his Britannic Majesty and the east part of the United States, by the name of the Saint Croix, was marked by that name on Mitchell's map, in the year 1782: That the river called by the native Indians the *Magaquadavie*, is the river there marked, and designated as the boundary. That the same river has been known as the river Saint Croix, by the Indians and white people, without any doubt or controversy until the year 1783. That the same has been uniformly until the year 1777 noted

and marked as the river of that name, on all the maps, public and private, which have been produced by the English and French Nations. That there is no clear and conclusive proof, that the Islands in the Scoodiac, are the Islands whereon M. De Monts wintered in 1604, and if there was such proof, it does by no means follow that the waters where those small islands are were called the St Croix, and much less would it follow that those waters had exclusively that appellation. That if the Scoudiac had, forever before the
 487 year 1782, been known and called by the name of Saint Croix, yet as the Magaquadavie was then, by the Commissioners who formed the treaty of peace, agreed to, marked and designated as a part of the boundary between the parties by the name of Saint Croix, and the only question now is, what river was truly then intended; there can be no possibility of leaving that river and establishing the Scoodiac as the boundary agreed to by the treaty of peace.

JURISDICTION

488 There may be a necessity of paying some attention to the argument which is raised on the part of the British Government, from the exercise of Jurisdiction over the lands in controversy.
 Acts of juris-
 diction The dates, or the forms of the Commissions, by which the authority of Nova Scotia was conducted, have not been exhibited by the Agent on that side. One of those Commissions, and no doubt the first which gave the exercise of civil authority in the vicinity of the bay of Passamaquoddy, is now on the table. It is to James Boyd Esquire as a Justice of the peace for the district of Saint John's River, to the western boundary of the Province. This Commission was dated the 17th March 1767. If any Commissions were made out before, there can be no pretence, that they contained a
 489 better description of territory, over which the power was to be exercised, than is given in the one produced. This Commission did by no means suggest where the western boundary of the province of Nova Scotia was.^a

490 ¹ P. 491 is blank.

^a Lord William Campbell Captain General and Governor in Chief in and over His Majesty's Province of Nova Scotia or Acadie and its Dependencies Vice Admiral of the same, &c &c To James Boyd Esq^r Greeting.

By virtue of the power and authority to me intrusted by his Majesty's Commission and royal instructions, reposing special trust and confidence in your loyalty, fidelity and good conduct, I do by these presents appoint you the said James Boyd, one of his majesty's Justices of the peace for a district from the river Saint John's to the western boundary of this province during pleasure. And you are hereby invested with all the powers and authorities specified and contained in a Commission of the peace for the County of Sunbury, bearing date the

In the year 1716, an act of the Legislature of Massachusetts provided that all the land eastward of the province of Maine should be and was annexed to the county of York. This was an act or exercise of Jurisdiction long before the commissions for Magistrates were issued by the governor of Nova Scotia. Commissions were made out to Magistrates, according to that act, by the Governor of Massachusetts bay, and when in 1760 and afterwards the same territory was sub-divided into five Counties, other Commissions were issued by the same, and were all acts of Jurisdiction, or instances of the exercise of civil authority, by the province of Massachusetts bay. 492

Neither the eastern limits of the one province, [n]or the western limits of the other, were determined by these acts; the line was still open to litigation as it theretofore had been. But the act of the one was as definite and conclusive as to local extension, as the other. The laws of Massachusetts are on the table to support the facts in this point.

Before the conquest of Canada and the peace of 1763 there was no contention, neither was there an exercise of civil authority in that part of the Country. In the year 1764 the Governor of Massachusetts directed a survey of the Bay of Passamaquoddy, and of the river Saint Croix, sent a party of troops, and gave John Mitchel, a surveyor, orders to effect the business. 493

The Agent for his Britannic Majesty has taken great pains to convince the honorable board that those orders were to survey the Scodiac as the Saint Croix. One would hardly believe him to be serious in the attempt, but, be that as it may, there can be no necessity for wandering through a wide field of argument quite foreign to the point. The orders are before the board, and are quite intelligible. He was to proceed to the bay of Saint Croix or Passamaquoddy to survey the coast between the rivers Saint Croix and Passamaquoddy, and eight miles up each of the said rivers. Now supposing that this was the first time that river was called Saint Croix, or the other Magaquadavie, yet that is nothing to the point of this question. It is plainly exhibited in the evidence that no other river, but that now called the Scodiac, was then called the Passamacodie. That river had that name on all the French and English maps which had then 494

eleventh day of August Seventeen hundred and sixty six. In Witness whereof I have signed these presents and caused the seal of the Province to be thereunto affixed at Halifax this seventeenth day of March, in the seventh year of the reign of our Sovereign Lord George the Third by the grace of God of Great Britain France and Ireland King Defender of the faith, &c and in the year of our Lord one thousand seven hundred and sixty-seven. WILLIAM CAMPBELL. By his Excellency's Command, R'D. BULKELEY.

been published. In the deposition of Cap^{tn} Jn^o Frost it is proved that, when Mitchel came down on that survey, he had Southack's map. That map is before the board, and exhibits the Scoodiac as the Passamaquoddy; and the Magaquadavie as the S^t Croix.

But there is something further to be considered; the orders were to
495 survey the shores between the two rivers Saint Croix and Passamaquoddy. By the latter name he could not mean the bay, because there are no shores between the river and the bay, let it be which river it may, and the Governor in his orders called the bay by the name of the Passamaquoddy or Saint Croix, and gave orders to survey it.

The Passamaquoddy river was further described. Mitchel was to take the distance from the east side of the river to the most western point in the bay, in order to connect the surveys. There were no surveys to be connected but those of the river Saint Croix, the river Passamaquoddy, the shores between the east side of the latter, and the western side of the Bay.

The Island of Passamaquoddy was by those orders to be surveyed,
496 and its distance from the eastern shore of the bay to be determined. No one will believe this to have been intended for any other purpose than that of finding whether the river Magaquadavie, on its way to the sea, took it in on its west side. Everybody knew that the Scoodiac did not. The Surveyors and their assistants, and the Officers that commanded the troops, all declare that they went there with their eyes directed to a river on the east side of the bay as the Saint Croix; that when they arrived with an Interpreter, which had been ordered by Government, the native Indians, under the solemnity of an oath, declared that the river on the east side of the bay had always been called the S^t Croix; and that
497 the Scoodiac never had been known by that name, and that they the Surveyors &^c survey'd that river as the one, which they were directed to survey as the Saint Croix. Against all this, there is urged with the appearance of sincerity that this could never be the river which they had orders to survey, because they were informed in those orders that they would find a pond or lake at the head of the river, from which they would pass over, under the guidance of the natives, to a branch of the Penobscott called Madanwamkeag. If it was now seen that the Indians had no carrying place from the source of the Magaquadavie to the Penobscott, yet it would
498 by no means follow from thence, that the orders of Governor Bernard, were given to survey the Scoodiac; and to pass from that to the Penobscott; for the internal part of that Country was then unexplored; and if the natives had been asked, whether they could pass out of the

Saint Croix, meaning the Magaquadavie, into Penobscott, they certainly would have answered in the affirmative. They could go across the bay into the Scoodiac, or from the source of the Magaquadavie into that river, or from the head of the Magaquadavie to the Medanwamkeag and, time being of no consequence in their manner of life, they would not stay to count the days or hours.^a

Be this as it may, there can be no room left for dispute on the point, that Governor Bernard claimed to, and surveyed the river to which the United States now claim as the river Saint Croix and the boundary established by the treaty of peace. 499

The negotiations between Bernard and Campbell putting the matter to sleep until Bernard was removed, Governor Hutchinson, in the year 1771, issued his Commission to William Brattle, James Bowdoin and Thomas Hubbard Esquires, three of the Council, to go down into the eastern part of the State for the purpose of settling a civil government there. 500

These Gentlemen reported to the Governor, and their report became a part of the records of the Executive, that the river Saint Croix was not the Passamaquoddy, but was the Magaquadavie.

Whether this was not an act of Claim and Jurisdiction is respectfully submitted to the Board.

Governor Bernard had before, in the year 1768, issued his proclamation, claiming for the province the lands between the river Penobscott and Saint Croix against the heir of Sir William Alexander, otherwise called Lord Stirling. His Heir did not claim under the Grant of King James to his Ancestor of the province of Nova Scotia, but under a grant in 1635 from the council for the affairs of New England. 501

This must have been a claim to the province, which was then intended for Alexander, when the whole Country was, on the dissolution of the Charters by Charles the First, to have been cut up into twelve provinces—three whereof were to have been east of New Hampshire.

This proclamation has been read.

From the Year 1771 to the Year 1783 there were no inhabitants on the bay of Passamaquoddy to exercise a jurisdiction over. A few men, who were employed in traffic with the natives, a few fishermen, and a few who claimed the Islands by grants from the Crown, were the aggregate of the whole settlement in that part of the Country. 502

^a It appears that the Passadumkeag is a branch of the Penobscott near the Scoodiac lakes, but that the Madanwamkeag is a great way from them.

As the argument raised from the supposed exercise of Jurisdiction is intended only to support the idea that the Commissioners, who made the treaty of peace, must have intended the Scoodiac as the boundary, to give efficacy to it three things would be absolutely necessary. First, it would be necessary to shew that the jurisdiction exercised was fixed and described by local and known limits: for the
503 undescribed and temporizing exercise of colonial jurisdiction, in a new country, is no evidence as to the permanent right of boundary, either of governmental powers, or of territorial property. So many instances will be recollected by this board, in support of this position, that it would be a misspence of time to repeat any of them.

Secondly, the lines of the exercise of such power ought to have been formally settled, and explicitly agreed to, but there is no pretence for that in the present case; the Settlers were within the same allegiance, under the same sovereign, and enjoying the same principles of Government, let them be on which side of the line they might; and it was
504 but of little consequence to them who held the reins of government over them. The seat of provincial government was too remote—the settlement too thinly made, and the land, besides being of small value, was in a very singular situation as to the power of granting it, by either province or by the Crown.

And thirdly, if there was a settled line of Jurisdiction, it ought to appear that the Commissioners knew it—knew where it was, and had an intention not to alter it. The evidence in the cause is far from proving this to have been the case—there is no ground to suppose that the Commissioners had any precise idea of the Country or of the settlement in that part of the Country, or that any regard was paid to circumstances of this nature, excepting what was mentioned as to the Islands^a

^a M^r Jay expressly declares, that the boundary of Massachusetts was intended as the boundary of the United States, but that there were then no precise and perfect conceptions of them with the Commissioners at Paris—and M^r Adams was so far from being influenced by considerations now urged by the English government, that he insisted on going to the S^t John as a boundary between the nations; and as that of the Massachusetts state. The same instrument which gave to the province of Massachusetts bay the soil and jurisdiction of the Colony of Plymouth and the province of Maine, gave it the qualified property, and the full jurisdiction of Sagadahoc, Acadie and Nova Scotia; Sagadahock and a part of Acadie were held under that grant until the revolution, and are now consequently a part of the United States. The Agent for his Majesty is zealous on the principle that a charter, treaty or instrument shall be construed from its own words independent of any extrinsic circumstance, and yet he here contends as zealously, that the words of this charter are to have a double meaning, or rather that when applied to one subject, they mean nothing, but when applied to another they are in full force. The province held the jurisdiction to all the country east of Kennebec and west of Nova Scotia, established courts of Justice, appointed Officers, organized the militia and granted the territory. The acts of Parliament, the orders of the King and Council, and the whole tenor of the royal

In the treaty it is provided that those Islands, which had before the American revolution been under the jurisdiction of Nova Scotia, should still remain within the British dominions, notwithstanding their falling on the west side of a line south from the mouth of the Saint Croix river. This shews that the Commissioners did not know what Islands were within that predicament, and that whatever main land had been under the jurisdiction of that province, and yet fell to the westward of the South line from the Saint Croix river, should remain to the United States.

This circumstance furnishes a powerful argument that the Commissioners knew nothing of the Country, either from their personal knowledge or from personal information; but that all the ideas which they possessed, relevant to the subject, were collected from the maps; and it appears from the testimonies of two of the Commissioners that Mitchell's map was their principal guide, as to this point. Here it may be added, that Doctor Franklin, in his letter to the Secretary of State, dated the 8th day of April 1790, declares that the English Commissioners brought with them from England the map compiled by Mitchell and that they took that for their guide, and marked the river they intended, as a part of the boundary, on that map. The manner therefore in which the Magaquadavie was established as the river S^t Croix, and made a part of the boundary in the treaty of peace, is such as would place any other cause beyond the reach of controversy.

The Agent for his Majesty appears to rely much, in point of jurisdiction, upon the grants made by the British Government of lands on the west of the river claimed to by the United States. Those grants have been so particularly noticed by the Agent of the United States already, that there can be no necessity for adding much on that head in this place. Before the Year 1783 the Grants were made by the British Government without any regard to the Scoodiac or the Magaquadavie. The lands on both sides of the Cobscook were granted, as well as those on the east of the Scoodiac. The fact is that the English government had never received the idea of the Scoodiac being the Saint Croix, until an act of parliament had, for particular purposes, described an east side line of Massachusetts. There were no grants made between the years 1774 and 1783, but, when the loyalists took their residence at Saint Andrews, they claimed not only

government previous to the revolution, was [*sic*] founded in the idea, of the country as far as the Saint Croix being under the provincial jurisdiction of Massachusetts. Even the very act of 1775, which called the Scoodiac the boundary for certain purposes was founded in that idea.

¹ Pp. 508 and 509 are blank.

the jurisdiction there, but as far west as to the Cobscook. Hence came the contentions between them and the people on Moose Island, and the shores near it, which have been already spoken of.

There are no doubt grants, and engagements for grants, from the Magaquadavie up to the Penobscott, but these can never change the nature of the question, or furnish evidence in favor of the party who
 512 happened to be bold enough to make the grants, or to enter into engagements to make them. M^r Morris, the Surveyor General of Nova Scotia, once reported the Cobscook to be the Saint Croix—and afterwards, when a part of Nova Scotia was created a province by the name of New Brunswick, he again in 1789 reports that “whether the Scoodiac or the Cobscook is the river the treaty fixes upon [as] the boundary he will not presume to say.”

In that report he gives an account of Bernard’s Claim on behalf of Massachusetts to the country east of the Scoodiac, and adds what has before been suggested, that the arguments of Governor Wilmot to
 513 Governor Bernard induced him to give up the claim. And that Bernard in the same year “applied for and obtained a grant from Governor Wilmot of one hundred thousand acres for himself and associates between the Cobscook and the Scoodiac Rivers.”

But, as the Governor of Massachusetts had no power to surrender the territory or jurisdiction of his Government, his Successor in 1771 renewed the exercise of Jurisdiction and condemned the conduct of his predecessor; and the claim, as has been shewn, has been kept up from that day to this. The motives on which Governor Bernard acted may appear from the observations of M^r Morris, which are here subjoined.

514 *Observations on the western limits of that part of Nova Scotia which is now called New Brunswick* ^a

M^r Bernard, Governor of Massachusetts Bay, in the year 1764 caused a survey of the bay of Passamaquoddy to be made, and
 Observations of Mr. Morris on western limits of New Brunswick proposed to the Governor of Nova Scotia the making of grants of lands, as being within the Massachusetts Government. The next year M^r Wilmot the Governor of Nova Scotia sent his chief land surveyor to make a survey of that bay also, and upon full enquiry it was found, that there were three rivers emptying into the Bay, which were called Saint Croix, that the river called by the Indians Copscook, was anciently called by the French Saint Croix, and on
 515 examining into the ancient grants of Nova Scotia it evidently ap-

^a The agent for the English government says this report or statement was to the Court of Admiralty on the request of the Solicitor General and a party on a seizure at Moose Island, and which the parties agreed to have used as if sworn to.

peared that the Grant made by King Charles the 2nd to his brother the Duke of York in 1663 (called the Duke of York's territory) was bounded by the river Saint Croix eastward, and by the river Kennebeck to the westward; that on the twelfth of August the same year, Sir William Alexander obtained a Grant of Nova Scotia; to wit, bounded westerly as far as the river Saint Croix, and to the furthestmost source or spring of that river, which comes from the west to mingle its waters with those of the river Saint Croix, and from thence running towards the north &c. All the Islands in Passamaquoddy bay are included in this grant, and have ever since been deemed to belong to Nova Scotia.

Upon Governor Wilmot's transmitting to Governor Bernard, the plans and reports made by the survey of Nova Scotia in 1765, Governor Bernard the same year applied to and obtained a Grant from Governor Wilmot of one hundred thousand acres, including Moose Island for himself and associates, to wit, Thomas Pownall, John Mitchell, Thomas Thornton and Richard Jackson, between Cobscook and Scoodiac rivers on the western side of Passamaquoddy Bay, and the remainder of the principal Islands in that bay, were the same year granted to sundry other Grantees by the Governor of Nova Scotia, so that the whole of Passamaquoddy bay, together with grand Menan and all the Islands in the bay, have ever been deemed to be within Nova Scotia until the separation of New Brunswick from it. 516

By the definitive treaty of peace signed at Paris 3^d Sept^r. 1783, the eastern limits or boundaries of the United States are thus described: East, by a line to be drawn along the middle of the river Saint Croix, from its mouth in the Bay of Fundy to its source, and from its source north to the high lands, comprehending all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova Scotia on the one part, and east Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic Ocean, excepting such islands as now are, or heretofore have been deemed within the limits of Nova Scotia. 517

This makes it clearly evident that Grand-Menan, Passamaquoddy, Great-Island, now called Campo Bello, Deer-Island, Moose-Island and indeed all the Islands lying in that Bay, whether on the southern or northern side of the line drawn due east from Saint Croix, should as formerly they did, belong to Nova Scotia. 518

Whether Scoodiac or Cobscook is the river the treaty fixes upon for the boundary, I will not presume to say, but from the manner in which those boundaries are expressed, I should imagine that river to be the river Saint Croix intended, whose source should be found furthest into the Country, westward and northward, towards the highlands mentioned in the treaty, being conformable to the old grants of Nova Scotia; and if my conjecture is well founded, the Saint Croix mentioned in the treaty cannot be effectually and properly ascertained until accurate surveys are made, and proper Commissioners are appointed thereupon. 519

If the native Indians and all the white people, as Curry and Hodges have declared, had agreed in their account that the Scoodiac had always been called the true and ancient Saint Croix, it would be a very extraordinary thing to find M- Morris, the Surveyor General of Nova Scotia, and a man of his extraordinary ability in this kind of knowledge, to be thus involved in doubts and difficulties on the subject, and to be reduced to the necessity of such a mode of reasoning as he has assumed on the occasion.

520¹ The Agent for his Majesty has informed the honorable board, that there have been acts of the legislature in the provinces of [the] English Empire, in which the lines of jurisdiction are defined. When he shall be pleased to exhibit those acts, the Agent for the United States will attend to them, but a mere averment that such acts have been made cannot be attended. The Acts themselves are the only regular proof of their existence; and the words they contain the only proof of their efficacy in this course.

The Statement of Morris, issued in a Court of Admiralty on a point of jurisdiction, is a very natural and proper Document in this point.

522

ON THE SOURCE OF THE RIVER

By the Treaty of Peace it is provided that a part of the boundary of the United States shall be a line drawn along the middle of the river Saint Croix, from its mouth to its source, and by a due north line from that to the Highlands which divide the waters that fall into the Atlantic, from those which fall into the Saint Lawrence.

The source of the
St. Croix

And by the Treaty of Amity and Commerce and Navigation between Great Britain and the United States, it is provided that the Commissioners to be appointed in pursuance of that treaty shall ascertain the Latitude and Longitude of that source.

In order to do this, the Commissioners must determine, first, what point or place shall be deemed the source within the intendment of the Treaty of peace.

The Agent for the United States has not yet undertaken to discuss this point, but, in his argument on the other points, has carelessly thrown out an Idea on the subject, intimating that he should consider the head of the tide as the source of the river within the meaning of the Treaty. Before he delivered over his argument, he was convinced that such an Idea, even if it should eventually prove to be a just one, was premature, and he therefore intended to have expunged

¹ P. 521 is blank.

it; from the remarks found in the reply of his Britannic Majesty's Agent, he believes that he did not do what he fully intended to have done. But the suggestion is of very little consequence, whether it remains in the argument or is obliterated. There is no river but what is derived from many reservoirs, which are fed by an infinite number of springs. These again depend upon subterraneous streams, which are issued from latent receptacles in the sides of the mountains, supplied by the vapours condensed in their vicinity. Which of these is the first, or the greatest, or which shall be called by way of pre-eminence the *Source* of a river in which they all unite, may be a question peculiar to each case, and depending upon a vast variety of facts and circumstances. 523

Although this question must have very frequently occurred in the discussion of public as well as of private, of national as well as of civic instruments, yet perhaps there never were two causes circumstanced exactly similar, or any one where the place determined to be the source, within the meaning of the instrument, must have necessarily, under other circumstances, or on another instrument, have been fixed upon as the source of that river.

When we come to consider what principles are to be resorted to in order to determine what shall be deemed the source of a river, we shall find it very difficult to fix upon any that would in all cases be rendered satisfactory. Should we consider that the body of waters, which appears to be the greatest aggregate or collections of a great number of springs and rivulets, ought to be the source, we there may meet with this difficulty, that a visible considerable stream may mingle with that collection the waters which are conducted from a distance of many leagues, and through a vast extent of valuable country. We may find a great number of those streams nearly of a size, coming from nearly equal distances, but from very different points of the compass. We find in all the great rivers in Europe and America a vast number of branches, nearly equal in importance, contending with each other for preeminence, and we can never, from considerations of their comparative length or bigness, determine to which the preference shall be given. 524

Lack of fixed or
uniform rules

There is, however, a well known sentiment which has ever had its effect in all countries, where questions of this nature have been agitated. The ideas of the parties, as collected from the history of the transaction, from the images relative to the business which were entertained by them at the time, from the papers and documents before them, and the general ideal forms of the territories adjacent to the river, will always

Prevalent
considerations

arise [exercise] an effectual influence in such discussions. The nature of almost every case has rendered it indispensably necessary to open a candid and liberal field on all those occasions. The impracticability of finally determining which stream, branch, spring, lake or pond, shall be preferred, simply from the comparative size of all, compels the parties to adopt conclusions from other considerations. Another important idea in all such cases is, that the parties at the time of the Contract (as was clearly the case here) are all totally ignorant of the situation, extent, and magnitude of the various branches, lakes, ponds and springs, which are connected with the river, the mouth of which they may have seen by themselves or by others.

525 The instances in which these principles and ideas have been acknowledged and have been carried into operation in this country are too numerous to be retailed in this argument, but it may be proper to mention some of them.

These may be introduced by beginning at the foundation, in a review of the Charters on which the country was originally parcelled out and settled.

Ideas found in
early charters

The Europeans who first discovered this Continent entertained an Idea that there was a sea on the north-west side of it, which they called the South Sea, and which they conceived to be much nigher to the western or Atlantic ocean than they have since found it to be. The right claimed from priority of discovery was from *Sea to Sea* throughout all the main lands. This was expressed in the Charter to the South Virginia Company, as well as in that to the North Virginia Company, which Charters included all the Country up to the forty-eighth degree of Northern latitude, and from the one Sea to the other.

The Country was again subdivided into Colonies, the courses of which, including the Massachusetts [province], and all those to the southward of it, were on parallel degrees of longitude.^a But the Grant of New Hampshire was made on different ideas. That province assumed a different shape. The west side line was on the Massachusetts [province]. But the east side line was on the Charter to Gorges issued in 1629 and confirmed in 1635, of the province of
526 Maine. That Charter began at the Sea, on the mouth of the Piscataqua river, and was bounded on the middle of that river, to a river called by the Natives Newichawanick, and up that river to its head, and then northwestwards till sixty miles be finished.^b

^a Maryland and Delaware may be considered as exceptions.

^b Hazard Coll. Vol. 1, page 383, 4, 5; Belknap, Vol. 1, page 13.

The grant by the Council of Plymouth to John Mason in 1629, of what is now New Hampshire, was thus bounded:

From the middle of Pascataqua river, and up the same to the farthest head thereof, and from thence northwestward until sixty miles from the mouth of the harbour were finished; also through Merrimack river, to the farthest head thereof, and so forward up into the land westward, until sixty miles were finished; and from thence to cross over land to the end of the sixty miles accounted from Pascataqua river; together with all islands within five leagues of the coast.

That coast has been since defined by authority, as will be shewn presently. The east line was on the river Newichewanack to its source, and then on a north line from that source until sixty miles be finished.

The Grant of the Province of Maine has been already mentioned; and was bounded West on Piscataqua river, up the same, and up the river Newichewanick, to the furthestmost head thereof; and then Northwestwards until 120 miles should be compleated from Piscataqua harbour and East on Sagadahock or Kennebeck, and up the same to its head, and then Northwestward until 120 miles from the mouth of Sagadahock shall be compleated.

The Grants of Land upon, and east of the river Kennebeck, were all made under an idea of extending from the Sea, North into the Country. The Plymouth Patent of a Tract thirty miles wide and eighty miles long, with the river Kennebeck in the center of it, was on a line parallel to the banks of the river, but the Grantor and Grantees very well knew that the course intended, from the Sea up that river from its mouth to its source, was a North course, so that the grant was in fact a grant of lands, lying North and South. On this idea, that 527 branch which came from the North to the Ocean was preferred to Androscoggin, which comes from the West, and to other branches which do not come so directly from the North.

The next English Grant to the one already described is the Pemaquid Patent, to Elbridge and Aldsworth of a tract of land bounded

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Then we come to the famous Patent of Beauchamp and Leverett on Penobscot river, which was described on the same idea, and bounded "extending directly ten leagues up into the main land, and

¹ The words here enclosed in brackets appear as a note written in red ink in the margin of the State Department copy.—EDITOR.

Continent there towards the South Sea, and the utmost limits of the space of ten leagues on the North and North East of a river in New England, called Penobscot towards the North and North East, and the Great Sea called the Western Ocean towards the East, and a strait line extending from the most western part, or point which extends from Muscongus aforesaid, towards the Sea, to the utmost Northern limits of ten leagues on the North side of the river Penobscot."

528 Wherefore it appears, that an idea of all the Charters and Patents, East of New Hampshire, were [was] of Tracts lying North and South.

When the line was settled between that part of the Province of Massachusetts, which had been originally granted to Sir Ferdinando Gorges, and the Province of New Hampshire, the word *Northwestward*, from the farthest head of the river *Newichawanick*, was construed to be a line North two Degrees West. Another line would have been consonant to the lines of the Grants further east but that would not have satisfied the word Northwestward. A west line would have been parallel to the lines of Grants further South, as well as to the other side line of New Hampshire, and though it might have satisfied the word Northwestward, yet it would deviate from the obvious intention of all the parties to those Eastern Charters.

* On its eastern side, New-Hampshire is bounded by the Atlantic ocean, from the aforementioned point, three miles northward of the mouth of Merrimack river, along the shore, to the middle of the main entrance of Pascataqua harbour; which distance is computed to be about eighteen miles. Thence the boundary line runs up the middle of the river, to its most northerly head, which is a pond, situated partly in the town of Wakefield and partly in the town of Shapley, in the County of York. The distance of this pond from the mouth of the harbour, is about forty miles, in a N. N.W. course. From the head of this pond, according to the royal determination, in 1740, the dividing line was to run "north, two degrees west, till one hundred and twenty miles were finished, from the mouth of Pascataqua harbour, or until it meet with his Majesty's other governments." The reason for mentioning this specific distance in the decree was, that one hundred and twenty miles were the extent of the Province of Maine.

229¹

On the other hand, the Province of New Hampshire, was to be bounded on the West from the head of Merrimac River, by a due west line. Thus this Province in a Triangular form, was the gore or wedge, which filled that space left by the diverging lines of the Southern and Northern Charters.

The Massachusetts considered themselves, as having a right to the

* Belknap, Vol. 3, pages 10 and 11.

¹ Error in record copy.

land three miles North of every part of Merrimack river; for those were in fact the words of their Grant. "And also all those lands, which lie and be within the space of three English Miles to the Northward of the said River Merrimack, or to the Northward of any and every part thereof, throughout the main land from the Atlantic to the South Sea."

There are a great number of streams which have their confluence in that river. One comes from a Lake called Winnepesaugett-Pond—but whether this is more considerable, than the one which comes from regions yet unexplored, and which is known by the name of Pemigewasset-river, is not yet determined.

The Province of Massachusetts knew very well that the line of the South side of their Patent or Charter boundary, was on a West course from a point ascertained to be three miles south of every part of Charles River; and that the other side was formed by a line three miles North of every part of the river Merrimack; and extending West from the Atlantic Ocean to the South Sea.

Upon this, that Province at one time claimed a line on a point three miles North of the place, where the waters are emptied out of Winnepessee Lake, into one branch of the Merrimack, and extending East to the Atlantic, and West to the South Sea.

It is a well known fact, that this line would run East of what is now the town of Portland. At another time, as it was uncertain which of the two branches of the river abovementioned was the greatest, a line was claimed East and West on a point three miles North of the confluence of them. This would strike the Sea many miles East of the mouth of Piscataqua river. At another time finding that the Government of the Mother Country did not approve either of the former constructions, the claim was made to a line, falling three miles North of the source of a stream called Black-Brook; upon an idea that this water might be considered as a part of the river. This construction however was disallowed, and the Government was of opinion, as we have it on the Records made of the copy of the order of the King in Council, and as we have it in Hutchinson and Belknap that this line was thus settled in 1740. 530

^a This censure being passed on the Governor, and the complaints being at an end; the way was prepared for a hearing of the appeals, from both Provinces, respecting the lines. Which being had, the determination of this long controversy was made on a plan entirely new. The special part of the decree of the Commissioners was set aside, and no regard was had to their *doubt*, whether the new charter

^a Belknap, Vol 2^d pages 169 and 170.

531

granted all the lands comprehended in the old. It was said, that when the first grant was made, the country was not explored. The course of the river, though unknown, was supposed to be from west to east; therefore it was deemed equitable, that as far as the river flowed in that course, the parallel line at three miles distance should extend. But as on the one hand, if by pursuing the course of the river, up into the country, it had been found to have a southern bend, it would have been inequitable to have contracted the Massachusetts grant; so, on the other hand, when it appeared to have a northern bend, it was equally inequitable to enlarge it. Therefore it was determined, "That the northern boundary of the province of Massachusetts be, a similar curved line, pursuing the course of Merrimack river, at three miles distance, on the north side thereof, beginning at the Atlantic Ocean, and ending at a point due north of Patucket falls; and a straight line drawn from thence due west, till it meets with his majesty's other Governments." The other parts of the decree of the Commissioners, respecting the northern line, and the payment of expenses, were affirmed.

These facts and determinations serve clearly to support this position, that the idea of the Mother Country, and the Colonies, was, that whilst the Southern Colonies were formed on parallel lines of latitude, the Grants East of the Province of Massachusetts were formed on lines from the Sea, North into the Country. The Massachusetts and the Colonies South of it, with three exceptions, only extended to the South Sea, but the Northern Grants were supposed to find a North boundary on the highlands, which divide them from Canada, and therefore were bounded by those highlands, or by a certain distance from the Atlantic which was supposed to reach that ridge of Mountains.

Even the Patent to Sir William Alexander, of which so much has been said, was formed on a line supposed to be North from the Sea. Every Map which bears the form of a stream or river under the appellation of the river Saint Croix, exhibits it as coming from the North, and losing itself in the Sea at a point due South from the Lake, or Pond, supposed to be its source.

532 The honorable Board will be pleased to cast their eyes on all the Maps exhibited in the cause, and to observe their conformity to each other in this respect.

From all these considerations, the Agent for the United States has the honor to submit this position, that what shall be considered as the source of a river within the intendment of a grant, patent, charter, or treaty, which is to be governed by it, may not depend on the size or form of a branch of a river, or upon its comparative length, or upon the ex-

Determination of
source dependent
upon a variety of
circumstances

tensiveness of a Lake or Pond from which it is issued, but upon a variety of circumstances and facts which may attach themselves particularly to each separate cause.

Perhaps the mode of expression adopted by his Majesty's Agent on this point, page 93¹, may more aptly convey this idea than it is done in the mode above taken, "that the several points are to be adjusted according to Justice and mutual convenience, *and in conformity to the intent of the Treaty.*"

Should the Magaquadavie be found to be the river, meant and intended in the Treaty of Peace by the name of the River Saint Croix, there will be no controversy in regard to what shall be deemed to be its source.

The Agent for the United States will not contend for the body of waters called the Lake *Utopia*, or that called *Pequesegehawgum*, or *Bear Lake*, though he might do it with as much propriety as the Agent for his Majesty contends for the *Scoodiac* Lake, upon a supposition that the *Scoodiac* is the river Saint Croix.

The North branch of the *Scoodiac*, if that river had been agreed on as the boundary, is quite consonant to all the ideas heretofore had and entertained by the several Nations, who have exercised Jurisdiction there, as to the general course of the river.

The arguments used by the Agent for his Majesty on this point are calculated more directly to prove the *Scoodiac* to be the river intended under the name of the Saint Croix, in the Treaty of Peace, than to shew a preference in the West to the North branch of that river, and though they are generally but a new arrangement of former arguments, yet a particular attention is due to them. A number of maxims, and principles, collected from divers authors, require a previous attention. 533

It may be well to attend to these principles, in the manner in which the Agent for his Majesty has seen fit to place them, because it is not practicable to reduce them to definite heads, or classes, excepting where they may be applied to the comparative bigness, and lengths, of the two branches of the *Scoodiac*.

We are told, "the true principle of the Law of Nations, recognized, and acknowledged, is, that the several points are to be adjusted, according to justice, and mutual convenience, in conformity to the *intent of the Treaty.*" However valuable this principle may appear to be, yet there is nothing more in it, than that the Treaty shall have a true construction according to the intent of the parties, at the time it was formed. To

Maxims of treaty
interpretation

¹Supra, 229.

establish a rule any broader than this would be subversive of all ideas of construction, and would be the support of new negotiations and in fact of new Treaties between the contracting parties, instead of giving to a former Treaty the *true meaning intended* by them when it was formed.

These rules, said to be practically established by civilized Nations, have no doubt grown out of transactions which have taken place between sovereign powers, in deciding on war, and in making peace; wherein facts have been conceded, and principles yielded, according to the strength of one of the parties, and the weakness and necessity of the other. One party has frequently insisted upon a demand, founded altogether in injustice and oppression, and to render it spec-
534 ciously fair and equitable, has talked loudly of Justice, and mutual convenience, conformable to former Treaties; whilst the other, unjustly robbed of its just and equitable rights, has concealed its disgrace, and buried its pride, in mean concessions, under an affected but involuntary regard to the same principles of pretended justice, equity, and mutual convenience.

Whatever principles may have been thrown on paper, as rules to govern Nations in their negotiations, or in the construction of their Treaties, yet none of them have been coercively obligatory upon any of the powers which may have acknowledged them, because, that there has never been, in any instance, a judicial decision between two Nations on a contract of this nature. Nevertheless, thus much may be collected from those rules, and principles that all have conceded, that it is just, equitable and proper to give to each Treaty a construction, consonant to the *intendment* of the contracting parties, when the same was made. This is all that is contended for by the United States, and this, that Government has the highest assurance, will be the ultimate determination of this controversy.

Another rule mentioned by the Agent for his Britannic Majesty, (page 93)¹ is, that the several parties shall be kept in possession of the sources of the rivers, the mouths of which are within their respective territories.

Wherever this rule may have arisen from, it never has been reduced to practice in the Nations of Europe, Asia, or America. Any one who casts his eye on the Maps of Europe will at once see that no regard is generally paid to it. Where rivers are not navigable for Ships of burden, it can never be of any consequence, and where the sources and main branches are in an unexplored, unsettled, and in an uncultivated Country, there never can be any degree of attention in
535 respect to them, attached to a Treaty between Nations.

¹ *Supra*, 229.

It is very clear, from the Treaty now under consideration, that the West branches of the Connecticut are within the dominions of his Britannic Majesty; and that one half of that river above the forty-fifth degree of North Latitude is his, but he has no dominion in the mouth of it. The whole of Lake George, Lake Oswego, and Lake Michigan, half the Lakes Champlain, Ontario, Superior, and the Lakes of the Woods, which empty their waters through the Saint Lawrence, are in the United States, but the river, which conveys the waters of those sources to the Sea, is wholly within the dominions of his Britannic Majesty.

But, was the rule suggested by the British Agent practiced upon by all the Nations of the World, there could be no argument raised from it in our case.

The Agent for his Majesty has taken up much time in stating and repeating his arguments to prove, and establish, that the contracting parties in the Treaty of Peace, between the United States and Great Britain, did not intend to alter the bounds of Massachusetts and Nova Scotia. These, in the origin, whether by Charters, by Orders of Executive Authority, or by implication, were both under the same sovereign power and parcels of the same Nation. The rights of the sources, navigation, and mouths of the rivers, to all the purposes for which rivers are used, as National immunities, were common to all the Subjects of the whole empire, and therefore when these Provinces were originated, and when they were possessed, the principle of convenience, as to the source of a river, being exclusively with the possessor or proprietor of its mouth, could never have been in contemplation.

Should we cast our eye on the Map of America, we shall find but a 536
very few instances where the source of a considerable river is within the same State which has possession of its mouth. This is an argument of great force in a cause where the Agent for one of the parties urges that the only question is, what were the boundaries of two Provinces heretofore, under the same sovereign power.

The Geography of the Country is so familiarly in the recollection of this honorable board, that the Agent for the United States will not give the members of it the trouble to hear him repeat those instances which are completely within their own knowledge, but he feels himself assured that the weight attached to this observation will not be unobserved by them, because he does not point to the instances, which he has ready, and which are as well known to them as to him.

When we examine the maps of the rivers concerned or involved in this dispute, we shall see that the principle cannot be applied, and

when we examine the Treaty, we find that the parties never intended to apply it.

Should we take a North line from the most Western of the Scoodiac Lakes, it crosses the Penobscot instantly and takes the main branch of it from a point, comparatively near the Sea, into the Dominions of the British Nation. It will intersect the Kennebeck, the West branch of the river Saint John, and probably cross the North branch of the Connecticut, before it reaches the highlands. The sources of all the considerable rivers in the New England States, will be taken
537 into the English Government. But if this is the line intended by the parties, when the Treaty was formed, this consequence ought not to be an objection to it; if it is wrong, it ought to be corrected by negotiation, not by judicial procedure.

But when we find Nations contending for the sources of rivers, because they are in the possession of the mouths thereof, we are led to consider them as navigable rivers, on which ships may be sailed, or at least on which boats, laden with the produce of the Country, may be floated to a market for exportation. The streams which can be improved only to drive the Mills, lave the Meadows, or to water the flocks, are not the subjects of those controversies.

It is said by the Agent for his Majesty, that a North line from the head of the Cheputnatekook will not reach the highlands, but will intersect the river Restigouche, which falls into the bay of Chaleurs, and into the Gulph, *not* into the river Saint Lawrence. Whether this is a fact cannot be decided, by any evidence offered in this trial. There has been no actual survey of the River Restigouche, and the Maps formed from imagination of all the rivers on the Continent, are found, upon actual surveys, to be essentially erroneous as to the places from whence they derive their sources, and as to their windings, and courses, at any considerable distance from the Sea. And there is no reason to believe the Maps of this unexplored river to be more correct than the others are.

Were this fact ascertained by indubitable evidence, there could be no argument raised from it against the North branch of the Scoodiac, or the Lake Magagawdawagun, being considered as the source intended in the Treaty of Peace.

The question, where a North line shall strike the Highlands, or
338: where the Highlands are, or what shall be denominated the Highlands within the intendment of the Treaty of Peace, is not submitted to this honorable Board. Two facts only are submitted, and the consequences of the verification of them, either way, are with the Nations in the submissions. The conveniences, and inconveniences, which may

¹ Error in record copy

result from the establishment of these facts, are the subjects of negotiation, and not of judicial decision; and therefore the consequences, excepting so far as the same may serve to explain the intention of the parties, can have no consideration here. Those consequences, which could not have been under contemplation when the Treaty was formed, because they were not then known, could have had no influence then, and of course can afford no aid in the investigation at this time.

It appears by the Map formed from the official surveys, that the sources of the *North branch of the Scoodiac*, and the West and Main branch of the Magaquadavie, are not far apart. There is a tract of Territory containing about three millions of acres, between these two rivers, which renders it of importance to decide properly which of these was intended in the Treaty of Peace by the name of the river Saint Croix; but the question, as to a North line from the source of either to the highlands, is of but little consequence to the parties; therefore the argument, if there is any, resulting from the effect of such due North line, applies nearly as well to the one as to the other.

A line due North from either the Magaquadavie, or the Cheput-³³⁹¹ natekook, intersects the West branch of the Saint John's river, about sixty miles above the new Capital of the Province of New Brunswick. Where it is to strike the highlands, or what river it may cross, is uncertain and quite immaterial. Long before that part of the Country shall be settled, or even effectually explored, the changes of Government on this Continent will probably render the Northwest angle of Nova Scotia of very little consequence to the English or American Nations.

There is no certainty, from any evidence yet offered, or which can be obtained, that there is such a place as has been contemplated by the name of the Highlands, which divide the waters running Northward from those running South.

The natural presumption is that rivers derive their waters from mountains, but there may be here, as there are in other parts of the World, extensive Plains, Morasses, and Bogs, whence the waters are issued to form the rivers, and these situated in such a manner that the line of division between the waters tending North, from those which run to the South, can never be ascertained and designated.

If there are Mountains forming a continued chain of high lands, we may, from observations made in other Countries, and from instances in our own, expect to find on the North side of them rivers running East, others West, others Northwesterly, and others again North-easterly. On the South side, we may expect to find others, running

¹ Error in record copy.

as well parallel to these, as in a direct opposite course, from those which run North, Northwesterly, and Northeasterly.

540 Under these considerations, it can be of no consequence in the present controversy where the highlands are, what part of them shall be the corner boundary, or whether the River Restigouche, or what other river, shall be intersected by the North line. A future day is reserved for those questions; by whom they will be settled, as well as the form in which that settlement shall be made, is with those generations to whom we are to leave the Country.

We are further told, that a North line from the source of that branch of the Scoodiac called the Cheputnatekook, and of consequence a North line from the source of the Magaquadavie, will injure and deform the Northwest angle of Nova Scotia—that imaginary point, that acre¹ in the clouds, that boundary established on a fog bank, but which has been treated with so much apparent seriousness by the Agent for his Majesty that it would not be polite or decent to treat it in the manner which it would otherwise merit. It has already, as the Agent for the United States believes, been fully shewn, that such an angle has been conceived, but has never yet had birth; that it has been supposed to exist, without the place of its existence having been seen or described; that it is a mere mathematical point, supposed to exist, because that in some future day a reasonable deduction of lines, from other points, may shew where it may be found.

But if this is intended by that Government, as an argument to influence the Board from the consideration that a line, drawn from the source of the river claimed by the United States as the river Saint Croix, will too much lessen the quantity of Territory in the Province of New Brunswick, this ought to be attended to.

551² If this suggestion was established by full proof, it would have no weight in the decision which we are in the expectation of. The comparative bigness of the Province of New Brunswick, so far as the same had been explored in the year 1782, and was known to the Powers concerned in the Treaty of that date, may have some consequence attached to it, but its point or end on the highlands was not much thought of at that time.

Should the Commissioners cast their eyes on any of the Maps of the Country, they will see an immense tract of Territory between the Magaquadavie, and the Gulph and river of Saint Lawrence. They will recollect, that when the Treaty of 1782 was made, the English

¹ So in State Department copy. Perhaps the original was "area." See Ganong, quoting from Boundary MS., in *A Monograph of the Evolution of the Boundaries of the Province of New Brunswick*. Proc. Trans. Roy. Soc. Canada. 1901, p. 307.—EDITOR.

² Error in record copy.

Government held Nova Scotia and New Brunswick as one Province only, and consisting of an immense tract of Territory. It is true that they have divided it into two Provinces, and they may if they please calculate on them as small. They may subdivide these, and calculate upon all as smaller still. But if they can gain what they now claim, they will be under a necessity, from the vast extent of their Territory, to create new Provinces still.

Furthermore, this is to be considered as a controversy, not with the Province of New Brunswick but with the English Empire, whose Territory on the American Continent is confined only by the distant Oceans which wash its Southeast, and Northwest sides. An Empire equal to those of Asia or Africa; and with whom the consideration of Leagues of Territory ought to have no influence.

On the other side, we are obliged to contemplate the United States as a long strip of Sea Coast, extending from the British to the Spanish dominions, East and West, and to but a limited and short extent from the tide.

These ideas were with the parties in treaty, when the peace was 542 established between them. The Commissioners on the part of the United States had the knowledge of the Sea Coast, and the general position of the mouths of the rivers on the Maps before them. They never could have intended to cede to the English Government nearly the whole of the County of Washington, the greater part of the County of Hancock, and a great proportion of the County of Lincoln, all within the State of Massachusetts. They could never have agreed to make the Easterly part of the United States a mere strip of sea wall, encircled in the arms of a Foreign Nation, whose dominion back is almost infinite in its extent.

When the evidence offered in the case is examined, it is found to be what any reasonable, judicious, impartial man would say it ought to be, and that the line agreed upon is what, under all the ideas and circumstances attached to the cause, it ought to be.

The Agent for the United States has before suggested, that in a cause circumstanced as this is, it cannot be proper to go into a consideration of what ought to have been the boundary, or what would have been fixed upon, if the Commissioners had as fully understood the position of the Rivers, and the Geography of the Country, as it is now known by this honorable Board: but as the Agent for his Majesty has led the way to this mode of argument, it was not improper thus far to follow him.

The river in fact agreed on, in the Treaty of Peace, and the source of that river, appears very fully from the evidence in the case.

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The evidence
before the Board

arguments respecting the source of the river, repeated his arguments on the other and main fact, the Agent for the United States will by no means follow him in that mode.

As it is seen that the Commissioners marked a river on Mitchell's Map, from its mouth to its source, and that the source of the river so marked is in its form, its bearing, and distance from the sea at the river's mouth, a very different thing from the source now contended for by his Majesty's Agent, one might have supposed that a contention, attended with so little probability of success, would have been long since abandoned: but as the argument appears to be continued with seriousness, a further attention to it, is necessary.

The arguments in favour of the West branch of Scoodiac, as the stream issuing from what ought to be deemed the source of the river Saint Croix, is founded in the supposition of proof that the Scoodiac is the river intended in the Treaty of 1782, and is predicated on the idea of that branch being more considerable than either the Magaquadavie, or the Cheputnatekook, and that it answers more aptly the description in Sir William Alexander's Patent.

When we come to examine that Patent with attention, we shall see that the arguments raised from it, as to what shall be considered the source now contended for, is, if possible, more inconclusive than that in regard to the river for the source of which we are now in search.

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The boundary of that grant is from the Cape Saint Mary's across the bay of Fundy, North, to a great harbour for Ships, between the regions of the Suroquois and Etchemins, to the river Saint Croix, and to the most Western part of the spring or source (Scaturiginem) which empties its waters through that river.

The Agent for his Majesty contends that Nova Scotia received its boundaries originally from that Charter, that it had continued under the same until the year 1782, and that there was no intention at that time, by the Treaty of Peace then made, to change or alter those boundaries. The answer to this is:

First. That it does not appear by the Treaty that Nova Scotia had, in the year 1782, any known and acknowledged boundaries which divided it from the United States.

Secondly. That if the Province of Nova Scotia had such known and acknowledged boundaries, they were either not those contained in the Charter to Sir William Alexander, or they were altered by the Treaty of Peace.

On the first, it is natural to observe that, in the second article of the Treaty of Peace, it is suggested that the boundaries of the States, which by the first article are acknowledged to be independent and sovereign States, were not so well known and understood, as that an acknowledgement of their Independence, and a relinquishment by his Britannic Majesty of all claims to Government and territorial rights thereof, by naming without describing them, was considered by the Nations, or by their Plenipotentiaries, to be sufficient, and therefore the Contracting parties, in the second article, added, "and that all disputes which might arise in future, on the subject of the boundaries of the said United States, may be prevented, it is hereby agreed and declared, that the following are, and shall be the boundaries."

Now it must be very evident, that the Nations who made that Treaty, did not consider the boundaries of the United States to be so well known, and fixed as that no explanation, or description was 545 necessary. Had the boundaries of Nova Scotia been known and settled, there could have been no necessity for the foregoing preamble, or room for a description in that instrument.

It is said, that the old, and former boundaries, were known, and that the Treaty intended only a description of what was then well known to exist. The answer is, that had that been the case there could have been no necessity for saying anything further, than that the United States should be bounded by the Province of Nova Scotia, from the bay of Fundy, until they reached the line of Lower Canada, as established by the English Government, and that they should then be bounded by the line of Canada, or the Quebec Government, on a Westerly course, on the highlands, to the western branch of Connecticut river. But here the line described for the States is a line, as has been before shewn, widely remote from the former line of Canada, or Quebec Government.

And the line or North-west angle of Nova Scotia is so far from appearing as being at that time settled, and acknowledged, that it was absolutely necessary to form a boundary for it. It is acknowledged that the boundary of Nova Scotia had been, before that time, contemplated as being on a river called the Saint Croix, and extending on its west side line about North from the bay of Fundy. But the Commissioners did not then undertake to decide, what had been called the Saint Croix, otherwise than by adopting a river represented upon a Map, and agreeing that the same river by them marked, as such, should be considered as the boundary intended by the Treaty of Peace.

If the Province of Nova Scotia had then such an acknowledged and 546

known boundary, the same was not regarded, but was altered by the boundaries agreed upon in the Treaty of Peace.

The whole of the United States were, expressly, by naming them severally, acknowledged to be free, sovereign and Independent

Former bounda-
ries not adopted as
the limits of the
independent
States

States, and yet it is as evident as it is that there was a Treaty, that the boundaries, by which they had formerly been known, were not considered as their true limits in their Independent State. The Colonies of Massachusetts, Connecticut, Virginia and the

Carolinas, extended by their Charters throughout to the South Sea. The quantity of territorial dominions allowed them in the Treaty of Peace is comparatively a mite, when measured with the extent of their Charters, and yet nothing is said in the Treaty as to their relinquishing a part of their ancient Territory. But the boundaries by which the King of Great Britain chose to describe the territory which he acknowledged as an Independent Nation, are made without regard to former Charters, grants, or boundaries. What is there so sacred in the Province with its Northwest angle, that its boundary could not then have been changed, as well as the boundaries of the United States, of Canada, and of West Florida?

The boundaries of West Florida had been extended by a royal Proclamation or Commission up to the Yazoo river near to the thirty-fourth degree of North Latitude, but the Treaty of Peace brought it back again to the thirty-first degree and altered the boundary of East Florida on the river Saint Mary's.

547 But if the bounds of Nova Scotia were in the year 1782 known, acknowledged, and held as sacred, whence did they originate, or when, where, and how were the same originated or established? It is very clear that the boundaries now contended for were not the boundaries given in the Charter of King James to Sir William Alexander, and we have not as yet heard of any order of the English Government, or any Act of the British Parliament, for altering the boundary on the West side of that Province, or of fixing or ascertaining the line of it, unless the Act of 1774, or 1775, already attended to, may be considered as such.

The boundaries given by the Charter to Alexander were across the bay of Fundy, from the Cape of Saint Mary, North to a great harbour, and then up the river vulgarly called the river Saint Croix, (not to the river or Island, which had been called by that name by M^r De Monts,) and to the most Western Spring or source which empties its waters through that river to the Ocean.

The Treaty of Peace draws a line along the middle of the river Saint

Croix, from its mouth in the Bay of Fundy, to the source of the same river. The words *the source of the river* are here used, as an expression of pre-eminence, to be applied, as by the consideration of all the circumstances of distance, courses, comparative sizes of various branches of the river, and intention of the parties, it ought to be. But the word *Scaturiginem, spring, or source*, in the Charter of Alexander, has an additional descriptive expression annexed to it, which shews that it did by no means intend the same, as would be expressed, simply by the words *the source*. The line of his province is to extend, not to the source of the river, but as far west as the most western spring which empties its waters through the river to the Atlantic Sea. This boundary therefore might go many leagues West, to a small inconsiderable fountain, whilst the true source, and real main branch of the river, would be found as many leagues to the East of it. The Treaty of Peace does not contemplate any thing of this kind, but regards the source of the river, according to the common intendment of the expression. The grant to Alexander was intended to comprehend the whole of the river Saint Croix, with all its branches and streams, and rivulets, that he might, against other Patentees, claim, and hold the dominion over the traffic, and fisheries of the river, and its appendages, as the Province of Massachusetts was to have the whole of the Merrimack, and the Charles rivers. But in the Treaty of Peace the river Saint Croix is divided between the Nations, without regarding any prior grant, or former description. 548 ¹

Previously to any observations on the comparative importance of the rivers contended for, it may be necessary to make one more remark on the course and extent of the river claimed by the United States. 550

Mr Morris in his report of 1789, which has been already seen, has this expression, "I should imagine that river, to be the river Saint Croix intended, whose source should be found furthest into the Country, Westward, and Northward towards the highlands mentioned in the Treaty, being *conformable to the old grants of Nova Scotia*." The grant to Alexander in 1621, and to the Duke of York in 1664, extended Northward from the Sea.

It is very clear, that the South branch of the Scoodiac is quite without this description. It is South of West in its general line from Passamaquody-bay, and has nothing like Northward attached to it. It is, in its general course, quite incompatible with the old grants of Nova Scotia Lands, and does not approach so near to the highlands, by many miles, as either the Cheputnatekook or the Magaquadavie.

¹ P. 549 is blank.

The Magaquadavie is completely within the description of *Northward* and *Westward*; which was the idea of [the] Nova Scotia west line in former times, as appears by the tenor of the old grants and charters, and by the ancient as well as the modern Maps.

The course of that river, or rather the line from its mouth, to the great Lake from whence it issues, is about North North West, and its source is higher to the Highlands than that of even the Cheputnatekook. The form of it is exactly what has been forever contemplated by all parties, as the line of Nova Scotia.

551 Had it appeared on the surveys, that the stream issuing into the Magaquadavie from Utopia Lake, or the one coming into the same river from Bear Lake, from the North Eastward, had been greater than that river was above their confluences severally, the Agent for the United States could not have felt himself supported in contending that the source of either of these was the source intended by the Treaty, because the source of the other is found Northward and Westward nearer to the Highlands, or where the Highlands are supposed to be, than either of them; and much more consonant to the idea which has been entertained of that boundary at all times than any other, and vastly more in coincidence with the line marked by the Commissioners who compiled the Treaty of Peace, than any other can be.

It has been observed, that what is the source of a river as intended by parties, making it a boundary or point of partition, is to be collected from a variety of circumstances.

From the ideas of the form of the Country, or territory, in the mind of the parties, when the compact was consummated, from the documents then before them, from the mode of expression made use of, from the ideas generally retained on the subject, or from the situation, extent, or importance of the branches contended for, or from all these collectively.

552 It appears from the surveys that the river Magaquadavie empties more water than either the Cheputnatekook or the South branch of the Scoodiac. The Lakes which yield their waters to the Scoodiac may have a wide, and some of them a respectable appearance; but no one of them appears more respectable than that which pours its waters into the Magaquadavie. The small streams by which those Lakes communicate are very narrow, and some of them are rather contemptible than otherwise. But the Magaquadavie continues its bigness and supports its respectability to the Lake which gives it existence.

The Agent for the United States is obliged, however, to concede that this argument cannot claim a very important place in the case.

because, that there is no great difference in the quantity of waters in each of the several rivers under consideration; and because, that the general course, as being consonant to the ideas of the parties, when the Treaty of Peace was made, to the lines originally, and at all times imagined, and exactly corresponded [corresponding] with the solemn Act of demarcation, when the Treaty was in process, these are to controul a circumstance which is not more nearly connected with a direct, and necessary conclusion.

This very important cause, being thus before the Board of Commissioners, appointed by a solemn Treaty, entered into by two Sovereign Powers, the Agent for the United States is willing here to rest the Interest of his Nation, unless any further observations made hereafter by the Agent for his Britannic Majesty, shall render it necessary for him to solicit the further attention of the honorable Board. But as the subject on both sides appears to be exhausted, there remains nothing for him to do, but in the most sincere, and 553 respectful manner, to acknowledge the patience, and candor, with which he has been treated, and the indulgence he has received, throughout a long and tedious process of investigation.¹

¹ At the close of the record of the argument, is this certification: "This Book contains a true copy from the original filed with me.—ED. WINSLOW, *Secretary to The Commissioners*. &c.—Providence/Rhode Island/October 20th 1798." For comments, see *infra*.—EDITOR.

